Washington University in St. Louis
SCHOOL OF LAW
Interdisciplinary Environmental Clinic

VIA CERTIFIED MAIL

November 30, 2012

Nancy Stoner
Assistant Administrator for Water
U.S Environmental Protection Agency
Office of Water (4101M)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Stoner:

Please find enclosed a Petition for Rulemaking Under the Clean Water Act for Water Quality Standards to Protect Missouri's Unclassified Waters. This Petition is submitted on behalf of the Missouri Coalition for the Environment. The Petition itself is submitted in paper copy and electronic form, while the exhibits are on the enclosed CDs.

If you have any questions, please call me at 314.935.8760 or send me an email at ejhubertz@wulaw.wustl.edu.

Sincerely,

Elizabeth J. Hubertz
Clinic Attorney

cc: Kat Logan Smith and Lorin Crandall

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BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF WATER

Petition for Rulemaking	)	
Under the Clean Water Act	)	
	)	**November 30, 2012**
	)	
Water Quality Standards for Missouri	)	
Unclassified Waters	)	

PETITION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR RULEMAKING TO PROTECT MISSOURI WATERS UNDER THE CLEAN WATER ACT

Submitted by:

Missouri Coalition for the Environment

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I. INTRODUCTION

The Missouri Coalition for the Environment (the "Coalition") petitions the United States Environmental Protection Agency ("EPA") and its Administrator, pursuant to the Administrative Procedure Act[1] and the Clean Water Act[2] ("CWA" or "the Act"), to exercise its authority under § 303(c)(4)(B)[3] of the Clean Water Act to 1) determine that a revised or new water quality standard is necessary for Missouri's waters to meet the requirements of the Clean Water Act, and 2) promulgate beneficial use designations[4] and associated water quality criteria in accordance with § 101(a)(2) of the Clean Water Act for all waters of the United States[5] ("waters of the U.S.") within Missouri for which a Use Attainability Analysis ("UAA") has not been performed and approved by EPA.

EPA has consistently recognized the rebuttable presumption of fishable/swimmable use attainability as an "essential foundation for effective implementation of the CWA as a whole."[6] The Coalition has spent more than 10 years working with the state of Missouri through its triennial review process, and has attempted to engage EPA Region 7 in its effort to have Missouri designate default fishable/swimmable uses for waters of the U.S. within Missouri. This work has been to no avail—today, 85% of rivers and streams in our state, and an additional number of lakes and wetlands, still have not been assigned *any* beneficial uses, let alone the default uses that federal law presumes are present in all waters.[7]

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[1] 5 U.S.C. § 553(e) (2011) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").
[2] 33 U.S.C. § 1251(e) (2011) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.").
[3] 33 U.S.C. § 1313(c)(4)(b) (2011).
[4] See page 9 for a discussion of use designation.
[5] See pages 8-9 for discussion of EPA's jurisdiction over "waters of the United States."
[6] Water Quality Standards for Kansas, 65 Fed. Reg. 41, 216, 41, 221 (July 3, 2000). Codified at 40 C.F.R. § 131.34 (2012).
[7] Crandall Decl. ¶¶ 7-11, Nov. 30, 2012, attached as Ex. 1.

The assignment of uses is the most fundamental requirement of the Clean Water Act. Yet, Missouri—apparently alone among states—has been out of compliance with this provision for almost 30 years. Missouri has made negligible progress toward meeting this minimal requirement despite repeated warnings and pressure from EPA to designate uses for its waters.

EPA delegates the authority and responsibility to assign designated uses to the Missouri Department of Natural Resources ("MDNR"). MDNR then grants rulemaking authority for the Water Protection Program to the Clean Water Commission ("the Commission"), a citizen's board appointed by the Governor. EPA Region 7 is responsible for ensuring that Missouri's rules and regulations are in compliance with the Act through the triennial review process.

As recently as March 9, 2012, Missouri—acting through the Commission—voted again not to assign fishable/swimmable uses (or any uses) to the currently unprotected waters, ignoring the entreaties of EPA's Regional Director of Water, Wetlands, and Pesticides.[8] Without EPA intervention, Missouri will not meet the fundamental requirements of the CWA in the foreseeable future and its rivers, streams, lakes and wetlands will continue to suffer as a result.

Missouri has adopted a stance of uncooperative federalism, notwithstanding efforts of EPA and stakeholders like the Coalition to help Missouri revise its standards and bring them into compliance with federal law. The State has undermined extensive efforts by EPA and the Coalition to achieve compliance for more than a decade by employing a variety of delay tactics, including exaggerated assurances of progress, false promises, and unenforceable deadlines. These are the exact circumstances for which Congress created § 303(c)(4)(B) of the CWA: it is clear that the state is not meeting the requirements of the Act and EPA is the one figure with the authority and ability to compel compliance.

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[8] Video, *3-09-12 Missouri Clean Water Commission Meeting Part 3 of 3*, YOUTUBE (Mar. 12, 2012), at 69'18"-73'45", http://www.youtube.com/watch?v=0fQ6l2YW_Q4&feature=relmfu.

EPA has exercised its § 303(c)(4) authority to promulgate uses and uphold the Act's rebuttable presumption on several previous occasions for states like Missouri that had repeatedly failed to do so. **Petitioners now request that EPA act consistently with its duty under the Clean Water Act, its policies, and previous actions and promulgate default fishable/swimmable use designations for all waters of the United States within Missouri's borders.**

II. PETITIONER

The Missouri Coalition for the Environment is a grassroots environmental advocacy organization with offices in St. Louis County. Since its founding in 1969, the Coalition has advocated for the protection of rivers, lakes, wetlands, and floodplains throughout the state of Missouri. The Coalition has a strong interest in ensuring that Missouri's water quality standards comply with the requirements of the federal Clean Water Act. The Coalition's members are adversely affected by Missouri's violations of the Act and EPA's inaction, which impact aquatic life and recreational uses of Missouri's waters. The Coalition's members reside within the state of Missouri and engage in a number of activities in and on the waters of Missouri. EPA's failure to ensure that Missouri's water quality standards comply with the Act negatively affects the Coalition's members' use and enjoyment of these waters.

III. STATUTORY BACKGROUND

A. The Goal of the Clean Water Act is to Make All Waters of the United States Fishable and Swimmable.

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of water pollution.[9] To this end, Congress declared that "it is the national goal that

[9] 33 U.S.C. § 1251(a) (2011).

wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."[10] This aspiration is commonly referred to as the Act's "fishable/swimmable" goal.

The maintenance and improvement of water quality is accomplished in large part through the application and enforcement of water quality standards.[11] EPA first promulgated a water quality standards regulation in 1975[12] as part of the water quality management regulations mandated under § 303(e) of the Act. At this early stage, the standards program had a relatively low priority, but the regulation did require the promulgation of appropriate water quality criteria necessary to support designated uses. Today, water quality standards must—at a minimum—contain three basic elements: (1) one or more designated uses for each body of water; (2) general water quality criteria protecting the water's appearance and specific water quality criteria defining the concentrations or levels of pollutants which may be present in the water and still support the designated use or uses; and (3) an anti-degradation policy.[13]

These minimum water quality standards apply to almost all water bodies within the United States.[14] The extent of EPA's jurisdiction over "waters of the U.S." is defined in the most recent EPA regulations to mean "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce," and the intrastate waters whose

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[10] 33 U.S.C. § 1251(a)(2).

[11] 33 U.S.C. § 1313 (2011). The United States Supreme Court has explained that water quality standards are crucial as they "supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *Arkansas v. Oklahoma,* 503 U.S. 91, 101 (1992) (quoting *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n. 12 (1976).

[12] 40 C.F.R. § 130.17.

[13] 40 C.F.R. § 131.6 (2012).

[14] 33 U.S.C. § 1362(7) (2011). As long as the water body is connected to the navigable waters of the state, it is covered by the Clean Water Act. "Navigable waters" is defined in the Act to mean "waters of the United States, including the territorial seas."

"use, degradation, or destruction … would affect or could affect interstate or foreign commerce," and any tributaries of any such waters.[15] Federal courts and EPA both agree that the definition of "waters of the U.S." is very broad and accordingly so is the Act's coverage.[16]

B. Assignment of Default Fishable/Swimmable Uses is Essential to the Implementation of the Clean Water Act.

EPA delegates primary responsibility for the prevention, reduction, and elimination of pollution of waterways to individual states.[17] This responsibility includes the state's obligation to promulgate water quality standards consistent with the purposes, goals, and requirements of the CWA for all waters of the U.S. within its borders.[18] Section 303(c)(2) of the Act requires that the water quality standards adopted by the state "protect the public health and welfare, enhance the quality of water, and serve the purposes of this Act."

As a first measure, each state is required to specify the appropriate water uses to be achieved and protected, taking into consideration the particular water body's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation."[19] The designation of uses is one of three fundamental elements required in a state's water quality standards. The other two elements, water quality criteria and anti-degradation policy, rest upon the use designation, and are designed to support and protect the assigned uses.[20] The use designation is the prerequisite for all that follows and without a designated use there can

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[15] 40 C.F.R. § 122.2 (2012).
[16] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes,* 474 U.S. 121, 134-35 (1985); *In re C.L. "Butch" Otter and Charles Robnett,* No. CWA-10-99-0202, 2001 WL 388944, at *2 (E.P.A. Apr. 9, 2001); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *United States v. Deaton,* 330 F.3d 698, 711-12 (4th Cir. 2003); *Headwaters, Inc. v. Talent Irrigation District,* 243 F.3d 526, 533 (9th Cir. 2001).
[17] 33 U.S.C. § 1251(b) (2011).
[18] 33 U.S.C. § 1313(c) (2011).
[19] 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10(a) (2012).
[20] 40 C.F.R. § 131.6 (2012).

be no protective water quality criteria or anti-degradation policy. When a state fails to assign use designations to water bodies, those waters are relegated to a realm where the CWA essentially does not exist. A water body without a designated use is unregulated and unprotected.

EPA regulations at 40 C.F.R. Part 131 interpret and implement the CWA by establishing a rebuttable presumption that fishable/swimmable uses are attainable and, therefore, should apply to a water body unless it is scientifically demonstrated that such uses are not attainable. EPA has repeatedly articulated the importance of the rebuttable presumption to the implementation of federal law. In its July 3, 2000 Federal Register Notice, EPA explained the importance of the rebuttable presumption as it promulgated default uses for Kansas:

> EPA believes that the rebuttable presumption policy reflected in these regulations is *an essential foundation for effective implementation of the CWA as a whole*. The "use" of a water body is the most fundamental articulation of its role in the aquatic and human environments, and all of the water quality protections established by the CWA follow from the water's designated use. If a use lower than a CWA section 101(a) goal use is designated based on inadequate information or superficial analysis, water quality-based protections that might have enabled the water to achieve the goals articulated by Congress in section 101(a) may not be put in place. As a result, the true potential of the water body may never be realized, and a resource highly valued by Congress and the public may be forever lost.[21]

EPA stressed the importance of the rebuttable presumption repeatedly in its proposed and/or final designated use rule promulgations for the states of Idaho,[22] Alabama,[23] and the Commonwealth of Puerto Rico.[24]

C. EPA has the Authority to Assign Default Fishable/Swimmable Uses When the States Fail to Do So.

When Congress passed the CWA, it established a balance between traditional state

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[21] Water Quality Standards for Kansas, 65 Fed. Reg. at 41,221 (emphasis added).
[22] Water Quality Standards for Idaho, 62 Fed. Reg. 23,004, 23,006 (Apr. 28, 1997).
[23] Water Quality Standards for Alabama, 63 Fed. Reg. 10,799, 10,800-01 (Mar. 5, 1998).
[24] Water Quality Standards for Puerto Rico, 69 Fed. Reg. 3,514, 3,515-17 (Jan. 26, 2004).

responsibility over water pollution and the need to set minimum national safeguards in the face of serious, unresolved environmental problems. In the spirit of cooperative federalism, states retain primacy over water pollution control, but only so long as they meet the necessary minimum requirements of federal law. Accordingly, the CWA anticipates that states will promulgate their own water quality standards and it vests final responsibility for enforcement in EPA.

The CWA's rebuttable presumption approach is an example of the maintenance of states' primacy rather than unilateral federal control. As EPA has stated: "[w]hile facilitating achievement of Congress' goals, the rebuttable presumption approach preserves States' *paramount role* in establishing water quality standards in weighing any available evidence regarding the attainable uses of a particular waterbody."[25] If a state believes that the fishable/swimmable water quality goals articulated by Congress are not being met and cannot be met, it may assign the water body a different use, but only if the new use assignment is based upon a credible "structured scientific assessment" of that water body.[26]

To confirm that the goals of the CWA are being upheld, each state must review its standards at least once every three years and make the results of the review available to the EPA Administrator.[27] EPA evaluates the adequacy of a state's water quality standards. EPA is directed to intervene and adjust the water quality standards according to the Act's requirements when state water quality standards fail to meet the requirements of the Act. [28] EPA has a duty to ensure that a state's standards comply with the CWA and it must promulgate adequate standards

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[25] Water Quality Standards for Puerto Rico, 69 Fed. Reg. at 3,516 (emphasis added).
[26] *See* 40 C.F.R. § 131.10(j)(1) (2012); 40 C.F.R. § 131.3(g) (2012).
[27] 33 U.S.C. § 1313(c)(1) (2011).
[28] 33 U.S.C. § 1313(c) (2011).

for states when they have failed to do so, in order to fulfill the purposes of the Act.[29]

Section 303(c)(4) of the CWA authorizes EPA to promulgate water quality standards in two situations: (A) when new or revised state water quality standards do not comply with the Act or (B) whenever the Administrator determines that new or revised standards are necessary to meet the requirements of the Act. The first applies when a state submits new or revised standards to EPA for review and EPA determines that the regulations are inconsistent with the applicable requirements of the CWA and EPA's regulations. EPA has insisted that its authority to make a § 303(c)(4)(A) determination is limited to the scope of the state's action so unless a state enacts a regulation that is contrary to the CWA, EPA's hands are tied.[30]

The second basis for EPA action to compel compliance, § 303(c)(4)(B), states that EPA shall "promptly" initiate promulgation "in any case where the Administrator determines that a new or revised standard is necessary to meet the requirements of [the Act]."[31] This provides EPA authority to promulgate standards in cases where states have not submitted new or revised standards for EPA approval. The rarity of EPA promulgation under this approach is to be expected, as without a state's submission of standards for EPA review, the impetus for EPA action must come from an alternative source. This Petition is such a source.

IV. MISSOURI WATERS DO NOT RECEIVE THE PROTECTION OF THE CLEAN WATER ACT EVEN WHEN THEY SUPPORT AQUATIC LIFE AND RECREATION.

Current water quality standards in Missouri provide fishable/swimmable protection only to a limited list of waters, leaving the majority of Missouri's waters unclassified. Unclassified

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[29] *Id.*

[30] As EPA is aware, the Coalition has attempted to make use of § 303(c)(4)(A) to compel Missouri's compliance with the Clean Water Act based on its revision of water quality standards that did not designate uses for all of its waters, but only for some. EPA vigorously defended the suit, and a Missouri federal court sided with EPA's view of its authority. *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903 (W.D. Mo. 2012).

[31] 33 U.S.C. § 1313(c)(4)(B) (2011).

waters are those which have no designated beneficial uses, and no specific water quality criteria to protect any CWA § 101(a) goal uses. Missouri's unclassified waters, including a number of lakes and all of its wetlands, are protected only by general, narrative criteria. The narrative criteria govern all waters in the state and qualitatively provide that all waters must be "free from" various contaminants.[32] Therefore, the majority of Missouri waters—those that remain unclassified—are not protected by the fishable/swimmable provisions of the CWA.

A. Missouri's Presumption of Unattainability Contradicts Federal Law.

Missouri's Clean Water Law states that waters are to be classified into three general categories: "L" for lakes, "P" for perennial streams and "C" for intermittent streams.[33] Once classified, the waters are listed in Tables G and H of Missouri's water quality standards rule[34] where they are assigned uses and corresponding numeric water quality criteria to protect those uses.[35] Tables G and H contain relatively few of Missouri's waterbodies. Table H contains approximately 15% of the rivers and streams that qualify as waters of the U.S. within Missouri, leaving more than 85% unclassified and inadequately protected.[36]

The fact that waters within Missouri must be classified to receive protection is contrary to

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[32] 10 C.S.R. 20-7.031(3) (2012) (generally providing that waters of the State must be "free from" a variety of contaminants, but neglecting to assign any default beneficial uses or specific criteria).

[33] 10 C.S.R. 20-7.031(1)(F) (2012).

[34] Table G Lake Classifications and Use Designations, 10 C.S.R. 20-7.031 (2012). Table H Stream Classifications and Use Designations, 10 C.S.R. 20-7.031 (2012).

[35] Numeric water quality criteria determine the amount of each pollutant that can be found in a water body while still allowing it to be safe for the use it was assigned. Numeric criteria are fundamental to the protection of a water body, as waters that appear "clean" to the observer, and would be determined so by narrative criteria, may be contaminated by non-apparent pollutants (e.g. E. coli, PCBs, lead, mercury, atrazine, chloride) that are detectable only by numeric values.

[36] *See* John Hoke, Mo. Dep't of Natural Res. Presentation to the Missouri Small Streams Advisory Group, PowerPoint presentation, slide 20 (Jan. 15, 2009), attached as Ex.2. (There is no readily available estimate of waters of the United States within Missouri. Missouri's presentation identifies 183,600 stream miles from the 1:24,000 scale National Hydrology Dataset and 24,566 miles of currently classified streams within Missouri. Using these numbers 85% of Missouri's waters are unclassified.). *See also* Crandall Decl. ¶¶ 7-8, Ex. 1. This calculation does not include wetlands or lakes.

the provisions of the CWA and EPA regulations interpreting and implementing the Act.[37] The Act does not contain a requirement of classification for adequate protection, nor does it contain any language that could be considered a counterpart to this provision of Missouri's Clean Water Law.[38] In fact, Missouri law is in direct opposition to the rebuttable presumption stating that all waters of the U.S. are presumed to be fishable/swimmable unless those uses have been proven unattainable. Waters of the U.S. within Missouri are presumed *not* to be fishable/swimmable unless they are classified and placed in Tables G or H. This feature alone renders Missouri's regulations inconsistent with EPA's interpretation of the CWA and calls for revision.

Missouri has made negligible efforts in recent years to expand the list of classified waters.[39] Furthermore, the relatively small fraction of classified waters offered appropriate federal protections are arbitrarily and unevenly distributed throughout Missouri because there is no set of guidelines or principles used to determine which waters become classified.

Most members of the public are unaware that the waters they use are not protected by the Clean Water Act's standards. They have no idea that Missouri regulations require members of the public to come forward and request classification for their waters to be protected for fishing and swimming. Even if Missouri citizens understood the State's presumption of non-protection, there are few opportunities for the public to request assignment of uses. The procedures to do so – to the extent such exist – are burdensome and the outcome is uncertain. Missouri will not

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[37] Water Quality Standards for Idaho, 62 Fed. Reg. at 23,006 ("EPA's regulations at 40 CFR Part 131 interpret and implement these provisions through a requirement that water quality standards provide for fishable/swimmable uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. Unless that presumption has been rebutted, a default designation of fishable/swimmable beneficial uses apply.").

[38] *See* Mo. Rev. Stat. § 644.011 (2012). The Missouri Clean Water Law actually expands fishable/swimmable designated uses to all waters of the State. However, Missouri's regulations fail to fully implement the law.

[39] The only recent large-scale change in the assignment of uses to waters took place in 2005 in order to meet the deadline in the Coalition's agreement with EPA. Settlement Agreement, ¶ 3(b), 4-5 (Dec. 16, 2004), attached as Ex. 3. Under the threat of EPA promulgation, the State finally added appropriate recreational uses to its previously classified waters. Order of Rulemaking, 30 Mo. Reg. 2415, 2429-31 (Nov. 15, 2005) (adding recreational uses to Table H).

necessarily assign the appropriate use to the water body even when a member of the public submits proof of the existence of aquatic life or whole-body recreational activities in a particular river, stream or lake. As far as the Coalition can determine, Missouri's decisions on whether or not to classify a water body are completely arbitrary, and more often than not, the State fails to recognize the existing uses.

B. Missouri's Unclassified Waters Support a Variety of Aquatic Life and Recreational Activities.

The Coalition and other members of the public have made repeated attempts to convince Missouri to assign fishable/swimmable uses to the rivers, streams, lakes and wetlands they use. These efforts have been completely unsuccessful, with one exception.[40] The overwhelming majority of water bodies that were unclassified in 2000 remain unclassified today.

1. Missouri's Rivers and Streams

The Coalition and other interested parties have frequently shouldered the burden of proving that Missouri's waters support fishing and/or swimming despite the fact that these default uses should already be recognized under the rebuttable presumption. In September 2005, the Coalition made a presentation to the Commission showcasing the quality of unclassified rivers and streams in the St. Louis area. A Coalition intern conducted a field survey of unclassified waters over the summer, comparing them with stretches of classified water bodies that had been assigned uses.[41] The survey of 20 streams found almost no qualitative difference between the two kinds of streams. Both classified and unclassified waters were sufficiently deep

[40] In 2007, the Coalition's former executive director provided Missouri Department of Natural Resources with data regarding an often-used, unclassified segment of Black Creek, which indicated the presence of aquatic life at both the macroinvertebrate and higher order species levels and also demonstrated the creek's utilization and suitability for whole body contact recreation. Letter from Edward Heisel, Exec. Dir., Mo. Coal. for the Env't, to Ed Galbraith, Dir. of Water Protection Program, Mo. Dep't of Natural Res., and William A. Spratlin, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7 (Nov. 21, 2007), attached as Ex. 4. The segment was placed on Table H in 2009. However, this is the only example of which the Coalition is aware.

[41] Washington Univ. Interdisciplinary Envtl. Clinic, Presentation to Clean Water Commission, Sample of Unclassified Waters: St. Louis County, St. Charles County, and Franklin County (Nov. 2, 2005), attached as Ex.5.

for whole body contact recreation and were substantial water bodies even in a time of drought. Both classified and unclassified waters supported a panoply of aquatic life and showed evidence of human use. The presentation also underscored the randomness of Missouri's classification scheme—uses and numeric water quality criteria were applied to water body segments based on geographic markers, such as roads and bridges, and not based on scientific data.[42] For example, Gravois Creek in St. Louis County becomes unclassified as it enters Grant's Farm, a popular recreational attraction visited by hundreds of people on a daily basis.[43] The Coalition made this presentation in an effort to convince the Commission to assign uses to the majority of Missouri's waters. The State took no action, not even the limited action of assigning uses to the specific stream segments featured in the presentation. Those segments remain unclassified today, more than seven years later.

In January 2008, the Coalition submitted scientific evidence of aquatic life in sixty-six streams to Missouri and EPA Region 7, representing 14 out of Missouri's 15 ecological drainage units.[44] Coalition staff traveled to each of these streams, took pictures and GPS readings, sampled the streams and recorded the aquatic life they found there, sorting it by species using standardized forms. For example, the Coalition looked at seven sites in the Cuivre River watershed, part of the Plains region, and found substantial evidence of aquatic life.[45] At Dry

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[42] Transcript of Missouri Clean Water Commission Meeting, 13-14 (Nov. 2, 2005) ("There are several other creeks which became unclassified once they crossed a given road or under a bridge, which didn't seem to have any apparent biological reason for the water stream."), attached as Ex.6.

[43] *See* Map of Gravois Creek, attached as Ex. 7. Map was prepared by the Coalition. Grant's Farm is also home to the paddocks where the famous Anheuser-Busch Clydesdales are raised. GRANT'S FARM, http://www.grantsfarm.com (last visited Nov. 2, 2012).

[44] "[G]roups of large watersheds having generally similar biota, geography, and climatic characteristics..." Ecological drainage units are a tool for characterizing the ecology of watersheds and can be used by planners and researchers to group and assess a variety of environmental patterns within and between these watershed groups. *Ecology—Ecological Drainage Units,* U.S. GEOLOGICAL SURVEY, http://nh.water.usgs.gov/projects/ct_atlas/tnc_edu.htm (last visited Nov. 1, 2012).

[45] It is further described as the Des Moines Drainage, covering Mississippi River Tributaries between the Des Moines and the Missouri Rivers.

Creek in Lincoln County, the Coalition found a variety of macroinvertebrates including crawfish.[46] In the Ozark Mountains, the East Fork of the Black River begins near the state's highest point, and flows south through Johnson's Shut-Ins State Park. Its narrow channel is used for floating, rafting and canoeing and contains tadpoles, fish, crawfish and many smaller macroinvertebrates.[47] Even in heavily agricultural Scott County, within the Mississippi River's alluvial plain in southeast Missouri, a stream with the unpromising name of Brushy Lake Ditch supports midges, snails and fish.[48]

After presenting this evidence of existing uses to Missouri, the Coalition formally requested that the State assign default aquatic life uses to all its presently unclassified streams. The Coalition asked the State to at least assign the aquatic life use to the sixty-six streams which were shown by the study to contain aquatic life. Missouri ignored this request when it was first presented in 2008, and ignored it again, when it was presented as part of the Coalition's comments on the 2009 revisions to Missouri's water quality rules.[49] None of these sixty-six waters are included in the 2012 water quality standard revisions and all sixty-six streams remain unclassified with no beneficial uses assigned to this day.

Another example of State inaction when presented with evidence of aquatic life occurred in May 2009 when the River des Peres Watershed Coalition submitted such data to MDNR. The letter included information about aquatic life in Deer Creek, specifically "recent and historic

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[46] *See* Chart and Photos, Field Survey, Dry Creek (Sept. 4, 2006), attached as Ex. 8. The sampler's notes stated "[e]xcellent site to sample; Many minnows and crayfish."

[47] *See* Chart and Photos, Field Survey, East Fork Tributary (Oct. 8, 2006), attached as Ex. 9. The sampler observed evidence of recent human use.

[48] *See* Chart and Photos, Field Survey, Brushy Lake Ditch (Nov. 5, 2006), attached as Ex. 10. These charts and photos are available for all sixty-six water bodies and are attached as Ex. 56.

[49] Letter from Dan Sherburne, Research Dir., Mo. Coal. for the Env't, and Kim Knowles, Staff Attorney, Mo. Coal. for the Env't, to Ed Galbraith, Dir. of Water Prot. Program, Mo. Dep't of Natural Res., and William A. Spratlin, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7 (Jan. 25, 2008), attached as Ex. 11.

USGS flow data, and collected aquatic life, flow and pool data."[50] The River des Peres Watershed Coalition asked that the entire length of the creek be classified from its headwaters to its confluence with the River des Peres. The submission included evidence of seven species of fish in addition to bullfrogs and snapping turtles.[51] Two-thirds of the surveyed sites had aquatic biodiversity scores greater than seven, indicating a healthy variety of aquatic life. The macroinvertebrate sampling similarly showed "a consistent, populous macroinvertebrate community" throughout the segment sampled.52 The River des Peres Watershed Coalition also submitted information about the attainability of recreational uses, showing that Deer Creek once had "permanent, continuous flow, even under drought conditions."[53] It also noted that the Litzsinger Road Ecology Center "has several hundred students per year in contact with the stream."[54] Once again, the State ignored evidence showing existing uses of streams, leaving the waters unprotected by state law.[55]

2. Missouri's Lakes

Missouri is home to thousands of lakes, ponds and impoundments. Most of these water bodies are not natural lakes, but are formed through the damming of a river, creek or stream. Missouri's lakes are used for swimming, canoeing, bird watching, boating, hunting waterfowl, and other recreational activities. They are home to fish, waterfowl, and amphibians, including salamanders, frogs, and toads, that all depend on clean water for survival. Because lakes, ponds, and impoundments are often closed bodies of water, pollutants rapidly concentrate in the water if

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[50] E-mail from Danelle Haake, Chairperson, River des Peres Watershed Coal., to Phil Schroeder, Chief of Water Quality Monitoring and Assessment, Mo. Dep't of Natural Res. (May 13, 2009, 04:39 PM CST), attached as Ex. 12. The supporting evidence for the River des Peres Watershed Coalition's request is part of Ex. 12.

[51] *Id.* at 2.

[52] *Id.*

[53] *Id. at 3.*

[54] *Id.*

[55] For reasons unknown, the State granted Mr. Heisel's request for classification (Ex. 4), but ignored the River des Peres Watershed Coalition's weightier request (Ex. 12). This is yet another example of the randomness of Missouri's classification system and the unknown procedures for getting a water body classified.

uses are not designated and enforced. Many of Missouri's lakes can be found in state parks, county parks or other established recreational areas. Many lakes are popular vacation locales, bringing visitors from neighboring states.

Missouri Lakes are randomly classified like the state's rivers and streams. Busch Wildlife Conservation Area provides a perfect example of Missouri's arbitrary classification system and how it fails the public. This 6,987-acre park in St. Charles County features more than 30 lakes, 14 miles of streams[56], and many acres of wetlands.[57] Some of its lakes and streams are protected with fishable/swimmable uses and some are not. None of its wetlands are protected.[58] According to the Missouri Department of Conservation, the park offers wildlife viewing, hiking, biking, hunting, fishing, boating, gun ranges, and an archery area. Many species of fish live in the lakes and streams, including bluegill, bass, crappie and catfish which are often caught and eaten. The park also has a retriever dog training area.[59] Because the rebuttable presumption is not in place in Missouri, citizens are on their own when it comes to determining which of these waters are safe for fishing and swimming, and they put their health at risk if they guess wrong.

3. Missouri's Wetlands.

Missouri law does not provide numeric criteria protection for the State's wetlands and does not assign designated uses to wetlands.[60] In 1990, EPA issued national guidance on water quality standards for wetlands, requiring states to "establish beneficial uses for wetlands, adopt existing narrative and numeric criteria for wetlands, adopt narrative biological criteria for

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[56] *August A. Busch Memorial Conservation Area,* MISSOURI DEPARTMENT OF CONSERVATION, http://mdc4.mdc.mo.gov/applications/moatlas/AreaSummaryPage.aspx?txtAreaID=4901 (last visited Nov. 2, 2012).
[57] *See* Map of Busch Memorial Conservation Area, attached as exhibit 13.This map was created by the Coalition using publicly available data.
[58] *Id.* The classified lakes appear in blue and the unclassified lakes appear in green.
[59] *August A. Busch Memorial Conservation Area,* MISSOURI DEPARTMENT OF CONSERVATION, http://mdc4.mdc.mo.gov/applications/moatlas/AreaSummaryPage.aspx?txtAreaID=4901 (last visited Nov. 2, 2012).
[60] 10 CSR 20-7.031(F)(7) (2012). Missouri has a class "W" for wetlands, but no wetlands appear in Tables G or H so no wetlands are classified and assigned uses or numeric criteria.

wetlands, and apply anti-degradation policies to wetlands" by 1993.[61] Missouri never met this goal and the last proposed rule did not comply with EPA's wetlands requirements, nearly 20 years after the deadline was first set. The failure to assign uses has regulatory consequences. MDNR issues permits through the 401 Water Quality Certification Process which are required in conjunction with 404 permits from the Army Corps of Engineers to dredge and fill wetlands. The MDNR permits are meant to ensure that dredging and filling activities will not violate state water quality standards, but because Missouri water quality standards are deficient, these permits do not protect wetlands from discharges and impacts.[62]

Wetlands provide a number of invaluable services, most important are flood control and water purification. According to EPA, wetlands provide between 1 and 1.5 million gallons of floodwater storage per acre.[63] For every acre of functional wetlands, over a million gallons of floodwater is abated. However, the services that wetlands provide are not sustainable without the assignment of beneficial uses to assure their protection. This is of particular importance considering Missouri's currently inadequate water quality standards and its relationship to the two largest rivers on the continent, the Missouri and Mississippi Rivers.

Numerous studies also document the existence of diverse aquatic life in wetlands.[64] The Missouri Department of Conservation states that the "diversity of wildlife species in Missouri's freshwater marshes is unmatched by any other type of habitat in the state."[65] Wetlands in Missouri are frequented by a number of shorebirds, including dowitchers, sandpipers, and

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[61] U.S. Envtl. Prot. Agency, *Water Quality Standards Handbook*, Transmittal Memo, v (1990), *available at* http://water.epa.gov/scitech/swguidance/standards/upload/2002_06_11_standards_handbook_handbookappxD.pdf.
[62] 10 CSR 20-6.060 (2012).
[63] U.S. Envtl. Prot. Agency, *Functions and Values of Wetlands*, EPA 843-F-01-002c (2001), *available at* http://water.epa.gov/type/wetlands/outreach/upload/fun_val_pr.pdf.
[64] Raymond D. Semlitsch & J. Russell Bodie, *Are Small, Isolated Wetlands Expendable?*, 12 CONSERVATION BIOLOGY 1129 (1998).
[65] *See* Mo. Dep't of Conservation, *Managing Wetlands*, MDCONLINE, http://www.mdc.mo.gov/landwater-care/wetlands-management/managing-wetlands (last visited Nov. 5, 2012).

yellowlegs, and are home to a number of invertebrates, amphibians, reptiles, fish, and mammals.[66] Unprotected wetlands and their decreased capacity for flood control and water purification increases the risk of losing these species and the benefits they provide in Missouri.

Numerous governmental and non-profit organizations have demonstrated both their desire and commitment to protecting Missouri's wetlands. Missouri is located along the Mississippi Flyway and is visited by thousands of migrating geese, ducks (especially mallard ducks), and other waterfowl during their annual migrations. Conservation group Ducks Unlimited has protected more than 86,000 acres of wetlands in Missouri to ensure that the birds are able to thrive.[67] Additionally, the Mingo Basin Partnership, a collaboration of 17 governmental and local conservation organizations, has worked to rehabilitate more than 21,000 acres in Missouri's Mingo Swamp Basin since 2009.[68] The partnership was awarded three million dollars in federal grants and provided an additional 10.6 million dollars in matching partner funds to restore the wetland as an important area for migratory waterfowl and land birds.[69] Despite the efforts of these organizations and the use of wetlands, like the Mingo Basin, by wildlife and aquatic life, Missouri wetlands have not been assigned any beneficial uses. Notably, the Mingo Basin Partnership includes MDNR which is responsible for the lack of wetlands protection and water quality standards in the first place.

The Coalition has created several maps showing wetlands and their connections to

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[66] *See* Mo. Dep't of Conservation, *Wetland Values*, MDCONLINE, http://www.mdc.mo.gov/landwater-care/wetlands-management/wetland-values (last visited Nov. 5, 2012).

[67] *Missouri Conservation Projects,* DUCKS UNLIMITED, http://www.ducks.com/missouri/missouri-projects (last visited Nov. 2, 2012).

[68] *The Mingo Basin Partnership,* MDCONLINE, http://mdc.mo.gov/blogs/duck-creek-ca-updates/tis-season (last visited Nov. 2, 2012).

[69] These numbers were calculated by summing the funding amounts allocated to the three different phases of the Mingo Basin Partnership Project:
Bird Habitat Conservation 2009, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/birdhabitat/Grants/NAWCA/Standard/US/2009_Sept.shtm.
Newsroom, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/midwest/News/release.cfm?rid=514.
Bird Habitat Conservation 2011, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/birdhabitat/Grants/NAWCA/Standard/US/2011_Sept.shtm (all last visited Nov. 2, 2012).

Missouri rivers, lakes and streams.[70] Since at least 2003, the Coalition has consistently asked that wetlands be protected through designation of default fishable/swimmable uses and corresponding numeric criteria. The State has continually ignored this request.

C. Missouri's Failure to Assign Uses to the Majority of its Waters Makes it Impossible for the State to Operate a Water Protection Program.

The State's failure to assign uses to its waters has serious implications for the Missouri's National Pollution Discharge Elimination System ("NPDES") permitting program. The CWA prohibits the discharge of any pollutant from a point source into any water of the U.S. unless the discharge complies with the other provisions of the Act.[71] One of those provisions, found in § 402(a), requires the discharger to first obtain a NPDES permit from the appropriate governmental agency, either EPA or the state if EPA has delegated permitting responsibilities to the state. The terms of the permits themselves must also comply with the relevant portions of the CWA and EPA regulations. For example, the NPDES permit must contain technology-based effluent limits.[72] The issuing government agency must also look at whether the technology-based limits are sufficient to prevent the discharger from violating state water quality standards or whether stricter standards are necessary.[73]

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[70] Exhibit 14 is a map that shows where wetlands from the National Wetlands Inventory ("NWI") are adjacent to either a National Hydrology Dataset High Resolution ("USGS NHDH") stream or river. Because the NWI includes Missouri's lakes, the currently classified lakes have been shown on this map as well to indicate which of these waters are currently protected under Missouri law. Although it is only possible to determine if a wetland is isolated or is an interconnected Water of the United States through a jurisdictional determination, it is clear that many hundreds of thousands of acres of wetlands in Missouri are interconnected waters. These waters should be afforded designated use protections and numeric water quality standards. The geospatial datasets used to compose this map are publicly available at www.msdis.missouri.edu, the NHDH can also be attained through the USGS at the website nhd.usgs.gov, and the NWI can be found at www.fws.gov/wetlands/Data/State-Downloads.html. In order to show the adjacent wetlands we used a GIS topology tool to select all of the wetlands from the NWI that are connected to a NHDH river or stream, then we repeated this process to select all of the wetlands bordering wetlands bordering the NHDH rivers and streams, and so on until the tool returned no selections—indicating that all of the interconnected wetlands adjacent to the NHDH had been selected.

[71] Specifically, sections: 301, 302, 306, 307, 318, 402 and 404. *See* 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, and 1344.

[72] 33 U.S.C. § 1311 (2011). 40 C.F.R. § 125.3 (2012).

[73] 33 U.S.C. § 1312 (2011). 40 C.F.R. § 122.44 (2012). This is a gross oversimplification of the permitting process,

However, most discharges are shielded from scrutiny in Missouri. Missouri operates its own NPDES program and currently has over 4,392 outfalls (permitted discharges) contained within 3,042 site-specific NPDES permits which discharge a variety of pollutants into lakes, rivers and streams.[74] Approximately 3,157 or 71.9% of these outfalls are into unclassified waters.[75] Because unclassified waters are not assigned uses, the unclassified rivers, streams, and lakes do not have numeric criteria associated with them. Without numeric criteria to govern the quantity and concentration of pollutants into the water, it is nearly impossible to determine whether an effluent discharge will have an effect on state water quality, unless the effluent causes an unmistakably apparent change (e.g., turns the water red).

Unlike NPDES permits in other states, most Missouri NPDES permits do not contain any water quality based limits. Missouri permits have only technology-based limits for certain pollutants—the lowest common denominator of water quality protection.[76] Without water quality based effluent limits it is impossible to effectively limit pollution discharges to protect fishable/swimmable uses.

When the Coalition and other members of the public have asked for more stringent effluent limits or inclusion of effluent limits protective of aquatic life or human health, the State has refused to establish them if the effluent discharges into an unclassified river, lake or stream. For example, the permit for the Gerald North lagoon contained technology-based treatment

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which also involves the Clean Water Act's anti-degradation rules. The crucial point is that without the assignment of uses and numeric water quality criteria, the permitting authority cannot determine the effluent's effect on the receiving stream and cannot calculate a water-quality based effluent limitation. The authority cannot compare it to the technology-based limit to determine whether it is more protective, and cannot take the receiving stream's water quality into account for anti-degradation purposes. *See, e.g.*, U.S. Envtl. Prot. Agency, *NPDES Permit Writers' Manual*, EPA-833-K-10-001, 6-22 (2010), *available at* http://www.epa.gov/npdes/pubs/pwm_2010.pdf.

[74] Crandall Decl. ¶ 16.

[75] *Id.* This figure was calculated by the Coalition using a GIS data layer provided by the Missouri Department of Natural Resources, all attached as Ex. 15: (A) NPDES GIS Shapefile, (B) Exported excel spreadsheet of data, and (C) Metadata.

[76] *See* 40 C.F.R. § 125.3(a). Many permits are in fact assigned even less stringent effluent limits.

effluent limits, restricting Biological Oxygen Demand ("BOD") and Total Suspended Solids. The permit did not contain numeric limits for most other pollutants, including pollutants like metals that harm aquatic life.[77] During the public comment period for the permit in February 2008, the Coalition requested the permit's effluent limits be updated with a more protective BOD limit to protect aquatic life.[78] MDNR declined, explaining, "[t]he receiving stream is an unclassified tributary of Cedar Fork and is 3.5 miles from the classified section of Cedar Fork. Consequently, the DO [dissolved oxygen] criteria does not apply."[79] No one had ever performed a scientific assessment on this stretch of the creek to determine whether it was capable of supporting fishable/swimmable uses. MDNR then presumed without any evidence that the water body did not and could not support aquatic life and refused to limit the discharge of pollutants harmful to aquatic life into the creek.

MDNR responded with the same inaction when the Coalition asked that bacteria limits be included in a permit to protect human health and recreation. The Coalition has commented on many public sewage treatment facility permits over the last five years and asked that fecal coliform limits be included in the permits to protect human health. Although discharges from sewage treatment plants unquestionably contain bacteria, MDNR refused to include these limits unless the discharges occurred within two miles of a classified stream assigned the whole body contact swimmable use. In response to a request for fecal coliform limits in the City of Clarence permit, the MDNR explained its position:

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[77] *See* Mo. Dep't of Natural Res., Draft Missouri State Operating Permit for Gerald North Lagoon, 4 (Jan. 25, 2008), attached as Ex. 16.

[78] Letter from Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic, to James A. Rhodes, Water Section Manager, Mo. Dep't of Natural Res. (Feb. 27, 2008), attached as Ex. 17.

[79] Letter from James A. Rhodes, Water Section Manager, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (Mar. 14, 2008), attached as Ex. 18. The final Gerald North Permit contained some monitoring provisions for metals, presumably to conduct reasonable potentials tests later if the state chose to do so. State Operating Permit for Gerald North Lagoon, at 3 (Mar. 21, 2008), attached as Ex.19. The final permit also contained some ammonia limits (ammonia as N), but the limits were not the ones that would have been imposed if the stream had been assigned a "fishable" use, such as the protection of aquatic life. *Id.* at 4.

> Regulation 10 CSR 20-7.015(8)(B)4.A. requires that discharges to a waterbody segment identified as a whole body contact recreation area or within two miles upstream of these areas be given fecal coliform effluent limitations. This facility is more than two miles upstream of the classified segment of the North Fork Salt River. Fecal coliform limits are not required for the City of Clarence discharges.[80]

These receiving waters should be assumed suitable for fishing and swimming, and treated as such by MDNR under EPA's rebuttable presumption. The permit should contain water quality based limits on the effluent discharge in order to keep the river safe for swimming. Under Missouri's presumption—which is not necessarily rebuttable—the receiving waters are presumed *unsuitable* for fishing and swimming, and are treated as such by the State. Missouri's failure to assign uses to unclassified waters ensures that the NPDES permits will not contain effluent limits that protect water quality as intended by federal law.

Missouri's presumption of unattainability also harms water quality in classified downstream segments because upstream waters may be unclassified and unregulated. If there is no numeric limitation on the City of Clarence's discharge of sewage into an unclassified tributary, that stream will likely be more polluted by the time it reaches a water body that is classified, thereby undermining the purpose of classification and assignment of uses.[81] Members of the public who use the classified waters experience those waters in a condition degraded by human activity and may be putting their health at risk. This situation frustrates regulatory enforcement because the upstream dischargers do not have water quality based limits in their permits, so it is unlikely that they are violating the terms of their permits. Accordingly, no further

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[80] Letter from Abbie Stockett, Environmental Specialist, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (Oct. 23, 2006). This was the State's standard reply. *See, e.g.*, Letter from Kevin Hess, Chief of Water Pollution Section, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (Feb. 26, 2007) (claiming that the State planned to convene a workgroup to discuss uses for unclassified waters); Letter from Gary L. Gaines, Regional Dir., Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (Oct. 1, 2007); Letter from Abbie Stockett, Environmental Specialist, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (July 2, 2008), all attached as Ex.20.

[81] This is true with the exception of the 2-mile rule for bacteria limits. MDNR requires disinfection for discharges within 2 miles of a classified stream. MDNR does not apply the 2-mile rule for aquatic life protection although in a few recent permits ammonia limits have been included. *See* 10 CSR 20-7.015(1)(A)(3) (2012) and 10 CSR 20-7.015(8)(B)(4) (2012).

action can be taken through the NPDES program to improve water quality. At best, this disparity among permittees means that downstream dischargers releasing into classified portions might have stricter water quality based limits than they would if such limits were also imposed on upstream dischargers. At worst, the waters supposedly designated fishable/swimmable may not be safe for such activities and the public and state regulators alike are unable to address that issue.

Unclassified waters are ignored by MDNR's impaired waters program, just as they are treated as unregulated for purposes of NPDES permits. Section 303(d) of the CWA requires the states to identify any impaired waters—waters for which technology-based controls are not stringent enough to enable them to meet the water quality standards set by states for a particular pollutant.[82] Impaired waters must be ranked by priority and the state must establish the Total Maximum Daily Load ("TMDL") for that water.[83] A TMDL "is a calculation of the maximum amount of a pollutant that a water body can receive and still safely meet water quality standards," along with an allocation of that amount to the pollutant's sources.[84] Most of Missouri's waters are unclassified and thus excluded from this program, no matter how impaired those waters may be.

The following is just one example of how the ineffectiveness of the impaired waters program affects Missouri's rivers and streams. In January 2010, two Washington University scientists prepared a study analyzing water quality data for St. Louis area streams.[85] The results indicated that the impairment of St. Louis area streams for parameters relevant to human health

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[82] *Overview of Impaired Waters and Total Maximum Daily Loads Program,* U.S. ENVTL. PROT. AGENCY OFFICE OF WATER, *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/intro.cfm (last visited Nov. 2, 2012).
[83] *Id.*
[84] *Id.*
[85] Robert E. Criss & Elizabeth A. Hasenmueller, *Water Quality Report for Small Streams of the St. Louis Area* (2010), attached as Ex. 21.

(bacteria) and aquatic life (dissolved oxygen) was "widespread and surprisingly uniform."[86] The authors noted that very few of these waters had been placed on the § 303(d) list of impaired waters, and observed the following:

> Selected reaches of St. Louis' creeks have been placed on the EPA 303d list for high chloride (e.g., River des Peres), high bacteria (e.g., Creve Coeur Ck.), or low D.O (e.g., Fishpot Ck.), and some for all three (e.g., Coldwater Ck. and Gravois Ck.; see MoDNR, 2009a). The available USGS data indicate that most creeks in the St. Louis area are as impaired in these parameters as are those listed examples . . . .[87]

The authors also "witnessed several examples of children and livestock wading or swimming in unclassified reaches of area creeks, as well as the widespread use of these streams by waterfowl and other wildlife." They asked that water quality standards be applied to these creeks and streams as a matter of public health.[88]

MDNR responded to this data by declining to add the described waters to its § 303(d) list, even though these waters had levels of chloride, E. coli or dissolved oxygen that were the same or higher than waters already listed as impaired for these pollutants. The State's rationale was that the waters were unclassified as a matter of Missouri regulations, and a water cannot fail to meet a water quality standard if no standard is assigned to the water.[89]

Kiefer Creek, one of the St. Louis County streams mentioned in the study above, provides another example of how the failure to designate uses undermines other aspects of Missouri's water protection program. Kiefer Creek flows through Castlewood State Park, a park

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[86] *Id.* at 329.
[87] *Id.*
[88] *Id.* at 329-30.
[89] Letter from John Ford, Water Quality Assessment Unit Chief, Mo. Dep't of Natural Res., to Robert Criss, Professor, Washington Univ. 1 (Aug. 9, 2010), attached as Ex.22.

PCL XL error

Subsystem: USERSTREAM

Error: MissingData

Operator: 0xd3

Position: 18433

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF WATER

Petition for Rulemaking	)	
Under the Clean Water Act	)	
	)	**November 30, 2012**
	)	
Water Quality Standards for Missouri	)	
Unclassified Waters	)	

PETITION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR RULEMAKING TO PROTECT MISSOURI WATERS UNDER THE CLEAN WATER ACT

Submitted by:

Missouri Coalition for the Environment

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I. INTRODUCTION

The Missouri Coalition for the Environment (the "Coalition") petitions the United States Environmental Protection Agency ("EPA") and its Administrator, pursuant to the Administrative Procedure Act[1] and the Clean Water Act[2] ("CWA" or "the Act"), to exercise its authority under § 303(c)(4)(B)[3] of the Clean Water Act to 1) determine that a revised or new water quality standard is necessary for Missouri's waters to meet the requirements of the Clean Water Act, and 2) promulgate beneficial use designations[4] and associated water quality criteria in accordance with § 101(a)(2) of the Clean Water Act for all waters of the United States[5] ("waters of the U.S.") within Missouri for which a Use Attainability Analysis ("UAA") has not been performed and approved by EPA.

EPA has consistently recognized the rebuttable presumption of fishable/swimmable use attainability as an "essential foundation for effective implementation of the CWA as a whole."[6] The Coalition has spent more than 10 years working with the state of Missouri through its triennial review process, and has attempted to engage EPA Region 7 in its effort to have Missouri designate default fishable/swimmable uses for waters of the U.S. within Missouri. This work has been to no avail—today, 85% of rivers and streams in our state, and an additional number of lakes and wetlands, still have not been assigned *any* beneficial uses, let alone the default uses that federal law presumes are present in all waters.[7]

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[1] 5 U.S.C. § 553(e) (2011) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").
[2] 33 U.S.C. § 1251(e) (2011) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.").
[3] 33 U.S.C. § 1313(c)(4)(b) (2011).
[4] See page 9 for a discussion of use designation.
[5] See pages 8-9 for discussion of EPA's jurisdiction over "waters of the United States."
[6] Water Quality Standards for Kansas, 65 Fed. Reg. 41, 216, 41, 221 (July 3, 2000). Codified at 40 C.F.R. § 131.34 (2012).
[7] Crandall Decl. ¶¶ 7-11, Nov. 30, 2012, attached as Ex. 1.

The assignment of uses is the most fundamental requirement of the Clean Water Act. Yet, Missouri—apparently alone among states—has been out of compliance with this provision for almost 30 years. Missouri has made negligible progress toward meeting this minimal requirement despite repeated warnings and pressure from EPA to designate uses for its waters.

EPA delegates the authority and responsibility to assign designated uses to the Missouri Department of Natural Resources ("MDNR"). MDNR then grants rulemaking authority for the Water Protection Program to the Clean Water Commission ("the Commission"), a citizen's board appointed by the Governor. EPA Region 7 is responsible for ensuring that Missouri's rules and regulations are in compliance with the Act through the triennial review process.

As recently as March 9, 2012, Missouri—acting through the Commission—voted again not to assign fishable/swimmable uses (or any uses) to the currently unprotected waters, ignoring the entreaties of EPA's Regional Director of Water, Wetlands, and Pesticides.[8] Without EPA intervention, Missouri will not meet the fundamental requirements of the CWA in the foreseeable future and its rivers, streams, lakes and wetlands will continue to suffer as a result.

Missouri has adopted a stance of uncooperative federalism, notwithstanding efforts of EPA and stakeholders like the Coalition to help Missouri revise its standards and bring them into compliance with federal law. The State has undermined extensive efforts by EPA and the Coalition to achieve compliance for more than a decade by employing a variety of delay tactics, including exaggerated assurances of progress, false promises, and unenforceable deadlines. These are the exact circumstances for which Congress created § 303(c)(4)(B) of the CWA: it is clear that the state is not meeting the requirements of the Act and EPA is the one figure with the authority and ability to compel compliance.

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[8] Video, *3-09-12 Missouri Clean Water Commission Meeting Part 3 of 3*, YOUTUBE (Mar. 12, 2012), at 69'18"-73'45", http://www.youtube.com/watch?v=0fQ6l2YW_Q4&feature=relmfu.

EPA has exercised its § 303(c)(4) authority to promulgate uses and uphold the Act's rebuttable presumption on several previous occasions for states like Missouri that had repeatedly failed to do so. **Petitioners now request that EPA act consistently with its duty under the Clean Water Act, its policies, and previous actions and promulgate default fishable/swimmable use designations for all waters of the United States within Missouri's borders.**

II. PETITIONER

The Missouri Coalition for the Environment is a grassroots environmental advocacy organization with offices in St. Louis County. Since its founding in 1969, the Coalition has advocated for the protection of rivers, lakes, wetlands, and floodplains throughout the state of Missouri. The Coalition has a strong interest in ensuring that Missouri's water quality standards comply with the requirements of the federal Clean Water Act. The Coalition's members are adversely affected by Missouri's violations of the Act and EPA's inaction, which impact aquatic life and recreational uses of Missouri's waters. The Coalition's members reside within the state of Missouri and engage in a number of activities in and on the waters of Missouri. EPA's failure to ensure that Missouri's water quality standards comply with the Act negatively affects the Coalition's members' use and enjoyment of these waters.

III. STATUTORY BACKGROUND

A. The Goal of the Clean Water Act is to Make All Waters of the United States Fishable and Swimmable.

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of water pollution.[9] To this end, Congress declared that "it is the national goal that

[9] 33 U.S.C. § 1251(a) (2011).

wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."[10] This aspiration is commonly referred to as the Act's "fishable/swimmable" goal.

The maintenance and improvement of water quality is accomplished in large part through the application and enforcement of water quality standards.[11] EPA first promulgated a water quality standards regulation in 1975[12] as part of the water quality management regulations mandated under § 303(e) of the Act. At this early stage, the standards program had a relatively low priority, but the regulation did require the promulgation of appropriate water quality criteria necessary to support designated uses. Today, water quality standards must—at a minimum—contain three basic elements: (1) one or more designated uses for each body of water; (2) general water quality criteria protecting the water's appearance and specific water quality criteria defining the concentrations or levels of pollutants which may be present in the water and still support the designated use or uses; and (3) an anti-degradation policy.[13]

These minimum water quality standards apply to almost all water bodies within the United States.[14] The extent of EPA's jurisdiction over "waters of the U.S." is defined in the most recent EPA regulations to mean "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce," and the intrastate waters whose

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[10] 33 U.S.C. § 1251(a)(2).

[11] 33 U.S.C. § 1313 (2011). The United States Supreme Court has explained that water quality standards are crucial as they "supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" *Arkansas v. Oklahoma,* 503 U.S. 91, 101 (1992) (quoting *EPA v. California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 205 n. 12 (1976).

[12] 40 C.F.R. § 130.17.

[13] 40 C.F.R. § 131.6 (2012).

[14] 33 U.S.C. § 1362(7) (2011). As long as the water body is connected to the navigable waters of the state, it is covered by the Clean Water Act. "Navigable waters" is defined in the Act to mean "waters of the United States, including the territorial seas."

"use, degradation, or destruction … would affect or could affect interstate or foreign commerce," and any tributaries of any such waters.[15] Federal courts and EPA both agree that the definition of "waters of the U.S." is very broad and accordingly so is the Act's coverage.[16]

B. Assignment of Default Fishable/Swimmable Uses is Essential to the Implementation of the Clean Water Act.

EPA delegates primary responsibility for the prevention, reduction, and elimination of pollution of waterways to individual states.[17] This responsibility includes the state's obligation to promulgate water quality standards consistent with the purposes, goals, and requirements of the CWA for all waters of the U.S. within its borders.[18] Section 303(c)(2) of the Act requires that the water quality standards adopted by the state "protect the public health and welfare, enhance the quality of water, and serve the purposes of this Act."

As a first measure, each state is required to specify the appropriate water uses to be achieved and protected, taking into consideration the particular water body's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation."[19] The designation of uses is one of three fundamental elements required in a state's water quality standards. The other two elements, water quality criteria and anti-degradation policy, rest upon the use designation, and are designed to support and protect the assigned uses.[20] The use designation is the prerequisite for all that follows and without a designated use there can

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[15] 40 C.F.R. § 122.2 (2012).
[16] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes,* 474 U.S. 121, 134-35 (1985); *In re C.L. "Butch" Otter and Charles Robnett,* No. CWA-10-99-0202, 2001 WL 388944, at *2 (E.P.A. Apr. 9, 2001); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *United States v. Deaton,* 330 F.3d 698, 711-12 (4th Cir. 2003); *Headwaters, Inc. v. Talent Irrigation District,* 243 F.3d 526, 533 (9th Cir. 2001).
[17] 33 U.S.C. § 1251(b) (2011).
[18] 33 U.S.C. § 1313(c) (2011).
[19] 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10(a) (2012).
[20] 40 C.F.R. § 131.6 (2012).

be no protective water quality criteria or anti-degradation policy. When a state fails to assign use designations to water bodies, those waters are relegated to a realm where the CWA essentially does not exist. A water body without a designated use is unregulated and unprotected.

EPA regulations at 40 C.F.R. Part 131 interpret and implement the CWA by establishing a rebuttable presumption that fishable/swimmable uses are attainable and, therefore, should apply to a water body unless it is scientifically demonstrated that such uses are not attainable. EPA has repeatedly articulated the importance of the rebuttable presumption to the implementation of federal law. In its July 3, 2000 Federal Register Notice, EPA explained the importance of the rebuttable presumption as it promulgated default uses for Kansas:

> EPA believes that the rebuttable presumption policy reflected in these regulations is *an essential foundation for effective implementation of the CWA as a whole.* The "use" of a water body is the most fundamental articulation of its role in the aquatic and human environments, and all of the water quality protections established by the CWA follow from the water's designated use. If a use lower than a CWA section 101(a) goal use is designated based on inadequate information or superficial analysis, water quality-based protections that might have enabled the water to achieve the goals articulated by Congress in section 101(a) may not be put in place. As a result, the true potential of the water body may never be realized, and a resource highly valued by Congress and the public may be forever lost.[21]

EPA stressed the importance of the rebuttable presumption repeatedly in its proposed and/or final designated use rule promulgations for the states of Idaho,[22] Alabama,[23] and the Commonwealth of Puerto Rico.[24]

C. EPA has the Authority to Assign Default Fishable/Swimmable Uses When the States Fail to Do So.

When Congress passed the CWA, it established a balance between traditional state

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[21] Water Quality Standards for Kansas, 65 Fed. Reg. at 41,221 (emphasis added).
[22] Water Quality Standards for Idaho, 62 Fed. Reg. 23,004, 23,006 (Apr. 28, 1997).
[23] Water Quality Standards for Alabama, 63 Fed. Reg. 10,799, 10,800-01 (Mar. 5, 1998).
[24] Water Quality Standards for Puerto Rico, 69 Fed. Reg. 3,514, 3,515-17 (Jan. 26, 2004).

responsibility over water pollution and the need to set minimum national safeguards in the face of serious, unresolved environmental problems. In the spirit of cooperative federalism, states retain primacy over water pollution control, but only so long as they meet the necessary minimum requirements of federal law. Accordingly, the CWA anticipates that states will promulgate their own water quality standards and it vests final responsibility for enforcement in EPA.

The CWA's rebuttable presumption approach is an example of the maintenance of states' primacy rather than unilateral federal control. As EPA has stated: "[w]hile facilitating achievement of Congress' goals, the rebuttable presumption approach preserves States' *paramount role* in establishing water quality standards in weighing any available evidence regarding the attainable uses of a particular waterbody."[25] If a state believes that the fishable/swimmable water quality goals articulated by Congress are not being met and cannot be met, it may assign the water body a different use, but only if the new use assignment is based upon a credible "structured scientific assessment" of that water body. [26]

To confirm that the goals of the CWA are being upheld, each state must review its standards at least once every three years and make the results of the review available to the EPA Administrator.[27] EPA evaluates the adequacy of a state's water quality standards. EPA is directed to intervene and adjust the water quality standards according to the Act's requirements when state water quality standards fail to meet the requirements of the Act. [28] EPA has a duty to ensure that a state's standards comply with the CWA and it must promulgate adequate standards

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[25] Water Quality Standards for Puerto Rico, 69 Fed. Reg. at 3,516 (emphasis added).
[26] *See* 40 C.F.R. § 131.10(j)(1) (2012); 40 C.F.R. § 131.3(g) (2012).
[27] 33 U.S.C. § 1313(c)(1) (2011).
[28] 33 U.S.C. § 1313(c) (2011).

for states when they have failed to do so, in order to fulfill the purposes of the Act.[29]

Section 303(c)(4) of the CWA authorizes EPA to promulgate water quality standards in two situations: (A) when new or revised state water quality standards do not comply with the Act or (B) whenever the Administrator determines that new or revised standards are necessary to meet the requirements of the Act. The first applies when a state submits new or revised standards to EPA for review and EPA determines that the regulations are inconsistent with the applicable requirements of the CWA and EPA's regulations. EPA has insisted that its authority to make a § 303(c)(4)(A) determination is limited to the scope of the state's action so unless a state enacts a regulation that is contrary to the CWA, EPA's hands are tied.[30]

The second basis for EPA action to compel compliance, § 303(c)(4)(B), states that EPA shall "promptly" initiate promulgation "in any case where the Administrator determines that a new or revised standard is necessary to meet the requirements of [the Act]."[31] This provides EPA authority to promulgate standards in cases where states have not submitted new or revised standards for EPA approval. The rarity of EPA promulgation under this approach is to be expected, as without a state's submission of standards for EPA review, the impetus for EPA action must come from an alternative source. This Petition is such a source.

IV. MISSOURI WATERS DO NOT RECEIVE THE PROTECTION OF THE CLEAN WATER ACT EVEN WHEN THEY SUPPORT AQUATIC LIFE AND RECREATION.

Current water quality standards in Missouri provide fishable/swimmable protection only to a limited list of waters, leaving the majority of Missouri's waters unclassified. Unclassified

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[29] *Id.*

[30] As EPA is aware, the Coalition has attempted to make use of § 303(c)(4)(A) to compel Missouri's compliance with the Clean Water Act based on its revision of water quality standards that did not designate uses for all of its waters, but only for some. EPA vigorously defended the suit, and a Missouri federal court sided with EPA's view of its authority. *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903 (W.D. Mo. 2012).

[31] 33 U.S.C. § 1313(c)(4)(B) (2011).

waters are those which have no designated beneficial uses, and no specific water quality criteria to protect any CWA § 101(a) goal uses. Missouri's unclassified waters, including a number of lakes and all of its wetlands, are protected only by general, narrative criteria. The narrative criteria govern all waters in the state and qualitatively provide that all waters must be "free from" various contaminants.[32] Therefore, the majority of Missouri waters—those that remain unclassified—are not protected by the fishable/swimmable provisions of the CWA.

A. Missouri's Presumption of Unattainability Contradicts Federal Law.

Missouri's Clean Water Law states that waters are to be classified into three general categories: "L" for lakes, "P" for perennial streams and "C" for intermittent streams.[33] Once classified, the waters are listed in Tables G and H of Missouri's water quality standards rule[34] where they are assigned uses and corresponding numeric water quality criteria to protect those uses.[35] Tables G and H contain relatively few of Missouri's waterbodies. Table H contains approximately 15% of the rivers and streams that qualify as waters of the U.S. within Missouri, leaving more than 85% unclassified and inadequately protected.[36]

The fact that waters within Missouri must be classified to receive protection is contrary to

[32] 10 C.S.R. 20-7.031(3) (2012) (generally providing that waters of the State must be "free from" a variety of contaminants, but neglecting to assign any default beneficial uses or specific criteria).
[33] 10 C.S.R. 20-7.031(1)(F) (2012).
[34] Table G Lake Classifications and Use Designations, 10 C.S.R. 20-7.031 (2012). Table H Stream Classifications and Use Designations, 10 C.S.R. 20-7.031 (2012).
[35] Numeric water quality criteria determine the amount of each pollutant that can be found in a water body while still allowing it to be safe for the use it was assigned. Numeric criteria are fundamental to the protection of a water body, as waters that appear "clean" to the observer, and would be determined so by narrative criteria, may be contaminated by non-apparent pollutants (e.g. E. coli, PCBs, lead, mercury, atrazine, chloride) that are detectable only by numeric values.
[36] *See* John Hoke, Mo. Dep't of Natural Res. Presentation to the Missouri Small Streams Advisory Group, PowerPoint presentation, slide 20 (Jan. 15, 2009), attached as Ex.2. (There is no readily available estimate of waters of the United States within Missouri. Missouri's presentation identifies 183,600 stream miles from the 1:24,000 scale National Hydrology Dataset and 24,566 miles of currently classified streams within Missouri. Using these numbers 85% of Missouri's waters are unclassified.). *See also* Crandall Decl. ¶¶ 7-8, Ex. 1. This calculation does not include wetlands or lakes.

the provisions of the CWA and EPA regulations interpreting and implementing the Act.[37] The Act does not contain a requirement of classification for adequate protection, nor does it contain any language that could be considered a counterpart to this provision of Missouri's Clean Water Law.[38] In fact, Missouri law is in direct opposition to the rebuttable presumption stating that all waters of the U.S. are presumed to be fishable/swimmable unless those uses have been proven unattainable. Waters of the U.S. within Missouri are presumed *not* to be fishable/swimmable unless they are classified and placed in Tables G or H. This feature alone renders Missouri's regulations inconsistent with EPA's interpretation of the CWA and calls for revision.

Missouri has made negligible efforts in recent years to expand the list of classified waters.[39] Furthermore, the relatively small fraction of classified waters offered appropriate federal protections are arbitrarily and unevenly distributed throughout Missouri because there is no set of guidelines or principles used to determine which waters become classified.

Most members of the public are unaware that the waters they use are not protected by the Clean Water Act's standards. They have no idea that Missouri regulations require members of the public to come forward and request classification for their waters to be protected for fishing and swimming. Even if Missouri citizens understood the State's presumption of non-protection, there are few opportunities for the public to request assignment of uses. The procedures to do so – to the extent such exist – are burdensome and the outcome is uncertain. Missouri will not

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[37] Water Quality Standards for Idaho, 62 Fed. Reg. at 23,006 ("EPA's regulations at 40 CFR Part 131 interpret and implement these provisions through a requirement that water quality standards provide for fishable/swimmable uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. Unless that presumption has been rebutted, a default designation of fishable/swimmable beneficial uses apply.").

[38] *See* Mo. Rev. Stat. § 644.011 (2012). The Missouri Clean Water Law actually expands fishable/swimmable designated uses to all waters of the State. However, Missouri's regulations fail to fully implement the law.

[39] The only recent large-scale change in the assignment of uses to waters took place in 2005 in order to meet the deadline in the Coalition's agreement with EPA. Settlement Agreement, ¶ 3(b), 4-5 (Dec. 16, 2004), attached as Ex. 3. Under the threat of EPA promulgation, the State finally added appropriate recreational uses to its previously classified waters. Order of Rulemaking, 30 Mo. Reg. 2415, 2429-31 (Nov. 15, 2005) (adding recreational uses to Table H).

necessarily assign the appropriate use to the water body even when a member of the public submits proof of the existence of aquatic life or whole-body recreational activities in a particular river, stream or lake. As far as the Coalition can determine, Missouri's decisions on whether or not to classify a water body are completely arbitrary, and more often than not, the State fails to recognize the existing uses.

B. Missouri's Unclassified Waters Support a Variety of Aquatic Life and Recreational Activities.

The Coalition and other members of the public have made repeated attempts to convince Missouri to assign fishable/swimmable uses to the rivers, streams, lakes and wetlands they use. These efforts have been completely unsuccessful, with one exception.[40] The overwhelming majority of water bodies that were unclassified in 2000 remain unclassified today.

1. Missouri's Rivers and Streams

The Coalition and other interested parties have frequently shouldered the burden of proving that Missouri's waters support fishing and/or swimming despite the fact that these default uses should already be recognized under the rebuttable presumption. In September 2005, the Coalition made a presentation to the Commission showcasing the quality of unclassified rivers and streams in the St. Louis area. A Coalition intern conducted a field survey of unclassified waters over the summer, comparing them with stretches of classified water bodies that had been assigned uses.[41] The survey of 20 streams found almost no qualitative difference between the two kinds of streams. Both classified and unclassified waters were sufficiently deep

[40] In 2007, the Coalition's former executive director provided Missouri Department of Natural Resources with data regarding an often-used, unclassified segment of Black Creek, which indicated the presence of aquatic life at both the macroinvertebrate and higher order species levels and also demonstrated the creek's utilization and suitability for whole body contact recreation. Letter from Edward Heisel, Exec. Dir., Mo. Coal. for the Env't, to Ed Galbraith, Dir. of Water Protection Program, Mo. Dep't of Natural Res., and William A. Spratlin, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7 (Nov. 21, 2007), attached as Ex. 4. The segment was placed on Table H in 2009. However, this is the only example of which the Coalition is aware.

[41] Washington Univ. Interdisciplinary Envtl. Clinic, Presentation to Clean Water Commission, Sample of Unclassified Waters: St. Louis County, St. Charles County, and Franklin County (Nov. 2, 2005), attached as Ex.5.

for whole body contact recreation and were substantial water bodies even in a time of drought. Both classified and unclassified waters supported a panoply of aquatic life and showed evidence of human use. The presentation also underscored the randomness of Missouri's classification scheme—uses and numeric water quality criteria were applied to water body segments based on geographic markers, such as roads and bridges, and not based on scientific data.[42] For example, Gravois Creek in St. Louis County becomes unclassified as it enters Grant's Farm, a popular recreational attraction visited by hundreds of people on a daily basis.[43] The Coalition made this presentation in an effort to convince the Commission to assign uses to the majority of Missouri's waters. The State took no action, not even the limited action of assigning uses to the specific stream segments featured in the presentation. Those segments remain unclassified today, more than seven years later.

In January 2008, the Coalition submitted scientific evidence of aquatic life in sixty-six streams to Missouri and EPA Region 7, representing 14 out of Missouri's 15 ecological drainage units.[44] Coalition staff traveled to each of these streams, took pictures and GPS readings, sampled the streams and recorded the aquatic life they found there, sorting it by species using standardized forms. For example, the Coalition looked at seven sites in the Cuivre River watershed, part of the Plains region, and found substantial evidence of aquatic life.[45] At Dry

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[42] Transcript of Missouri Clean Water Commission Meeting, 13-14 (Nov. 2, 2005) ("There are several other creeks which became unclassified once they crossed a given road or under a bridge, which didn't seem to have any apparent biological reason for the water stream."), attached as Ex.6.

[43] *See* Map of Gravois Creek, attached as Ex. 7. Map was prepared by the Coalition. Grant's Farm is also home to the paddocks where the famous Anheuser-Busch Clydesdales are raised. GRANT'S FARM, http://www.grantsfarm.com (last visited Nov. 2, 2012).

[44] "[G]roups of large watersheds having generally similar biota, geography, and climatic characteristics..." Ecological drainage units are a tool for characterizing the ecology of watersheds and can be used by planners and researchers to group and assess a variety of environmental patterns within and between these watershed groups. *Ecology—Ecological Drainage Units,* U.S. GEOLOGICAL SURVEY, http://nh.water.usgs.gov/projects/ct_atlas/tnc_edu.htm (last visited Nov. 1, 2012).

[45] It is further described as the Des Moines Drainage, covering Mississippi River Tributaries between the Des Moines and the Missouri Rivers.

Creek in Lincoln County, the Coalition found a variety of macroinvertebrates including crawfish.[46] In the Ozark Mountains, the East Fork of the Black River begins near the state's highest point, and flows south through Johnson's Shut-Ins State Park. Its narrow channel is used for floating, rafting and canoeing and contains tadpoles, fish, crawfish and many smaller macroinvertebrates.[47] Even in heavily agricultural Scott County, within the Mississippi River's alluvial plain in southeast Missouri, a stream with the unpromising name of Brushy Lake Ditch supports midges, snails and fish.[48]

After presenting this evidence of existing uses to Missouri, the Coalition formally requested that the State assign default aquatic life uses to all its presently unclassified streams. The Coalition asked the State to at least assign the aquatic life use to the sixty-six streams which were shown by the study to contain aquatic life. Missouri ignored this request when it was first presented in 2008, and ignored it again, when it was presented as part of the Coalition's comments on the 2009 revisions to Missouri's water quality rules.[49] None of these sixty-six waters are included in the 2012 water quality standard revisions and all sixty-six streams remain unclassified with no beneficial uses assigned to this day.

Another example of State inaction when presented with evidence of aquatic life occurred in May 2009 when the River des Peres Watershed Coalition submitted such data to MDNR. The letter included information about aquatic life in Deer Creek, specifically "recent and historic

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[46] *See* Chart and Photos, Field Survey, Dry Creek (Sept. 4, 2006), attached as Ex. 8. The sampler's notes stated "[e]xcellent site to sample; Many minnows and crayfish."

[47] *See* Chart and Photos, Field Survey, East Fork Tributary (Oct. 8, 2006), attached as Ex. 9. The sampler observed evidence of recent human use.

[48] *See* Chart and Photos, Field Survey, Brushy Lake Ditch (Nov. 5, 2006), attached as Ex. 10. These charts and photos are available for all sixty-six water bodies and are attached as Ex. 56.

[49] Letter from Dan Sherburne, Research Dir., Mo. Coal. for the Env't, and Kim Knowles, Staff Attorney, Mo. Coal. for the Env't, to Ed Galbraith, Dir. of Water Prot. Program, Mo. Dep't of Natural Res., and William A. Spratlin, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7 (Jan. 25, 2008), attached as Ex. 11.

USGS flow data, and collected aquatic life, flow and pool data."[50] The River des Peres Watershed Coalition asked that the entire length of the creek be classified from its headwaters to its confluence with the River des Peres. The submission included evidence of seven species of fish in addition to bullfrogs and snapping turtles.[51] Two-thirds of the surveyed sites had aquatic biodiversity scores greater than seven, indicating a healthy variety of aquatic life. The macroinvertebrate sampling similarly showed "a consistent, populous macroinvertebrate community" throughout the segment sampled.52 The River des Peres Watershed Coalition also submitted information about the attainability of recreational uses, showing that Deer Creek once had "permanent, continuous flow, even under drought conditions."[53] It also noted that the Litzsinger Road Ecology Center "has several hundred students per year in contact with the stream."[54] Once again, the State ignored evidence showing existing uses of streams, leaving the waters unprotected by state law.[55]

2. Missouri's Lakes

Missouri is home to thousands of lakes, ponds and impoundments. Most of these water bodies are not natural lakes, but are formed through the damming of a river, creek or stream. Missouri's lakes are used for swimming, canoeing, bird watching, boating, hunting waterfowl, and other recreational activities. They are home to fish, waterfowl, and amphibians, including salamanders, frogs, and toads, that all depend on clean water for survival. Because lakes, ponds, and impoundments are often closed bodies of water, pollutants rapidly concentrate in the water if

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[50] E-mail from Danelle Haake, Chairperson, River des Peres Watershed Coal., to Phil Schroeder, Chief of Water Quality Monitoring and Assessment, Mo. Dep't of Natural Res. (May 13, 2009, 04:39 PM CST), attached as Ex. 12. The supporting evidence for the River des Peres Watershed Coalition's request is part of Ex. 12.
[51] *Id.* at 2.
[52] *Id.*
[53] *Id. at 3.*
[54] *Id.*
[55] For reasons unknown, the State granted Mr. Heisel's request for classification (Ex. 4), but ignored the River des Peres Watershed Coalition's weightier request (Ex. 12). This is yet another example of the randomness of Missouri's classification system and the unknown procedures for getting a water body classified.

uses are not designated and enforced. Many of Missouri's lakes can be found in state parks, county parks or other established recreational areas. Many lakes are popular vacation locales, bringing visitors from neighboring states.

Missouri Lakes are randomly classified like the state's rivers and streams. Busch Wildlife Conservation Area provides a perfect example of Missouri's arbitrary classification system and how it fails the public. This 6,987-acre park in St. Charles County features more than 30 lakes, 14 miles of streams[56], and many acres of wetlands.[57] Some of its lakes and streams are protected with fishable/swimmable uses and some are not. None of its wetlands are protected.[58] According to the Missouri Department of Conservation, the park offers wildlife viewing, hiking, biking, hunting, fishing, boating, gun ranges, and an archery area. Many species of fish live in the lakes and streams, including bluegill, bass, crappie and catfish which are often caught and eaten. The park also has a retriever dog training area.[59] Because the rebuttable presumption is not in place in Missouri, citizens are on their own when it comes to determining which of these waters are safe for fishing and swimming, and they put their health at risk if they guess wrong.

3. Missouri's Wetlands.

Missouri law does not provide numeric criteria protection for the State's wetlands and does not assign designated uses to wetlands.[60] In 1990, EPA issued national guidance on water quality standards for wetlands, requiring states to "establish beneficial uses for wetlands, adopt existing narrative and numeric criteria for wetlands, adopt narrative biological criteria for

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[56] *August A. Busch Memorial Conservation Area,* MISSOURI DEPARTMENT OF CONSERVATION, http://mdc4.mdc.mo.gov/applications/moatlas/AreaSummaryPage.aspx?txtAreaID=4901 (last visited Nov. 2, 2012).
[57] *See* Map of Busch Memorial Conservation Area, attached as exhibit 13.This map was created by the Coalition using publicly available data.
[58] *Id.* The classified lakes appear in blue and the unclassified lakes appear in green.
[59] *August A. Busch Memorial Conservation Area,* MISSOURI DEPARTMENT OF CONSERVATION, http://mdc4.mdc.mo.gov/applications/moatlas/AreaSummaryPage.aspx?txtAreaID=4901 (last visited Nov. 2, 2012).
[60] 10 CSR 20-7.031(F)(7) (2012). Missouri has a class "W" for wetlands, but no wetlands appear in Tables G or H so no wetlands are classified and assigned uses or numeric criteria.

wetlands, and apply anti-degradation policies to wetlands" by 1993.[61] Missouri never met this goal and the last proposed rule did not comply with EPA's wetlands requirements, nearly 20 years after the deadline was first set. The failure to assign uses has regulatory consequences. MDNR issues permits through the 401 Water Quality Certification Process which are required in conjunction with 404 permits from the Army Corps of Engineers to dredge and fill wetlands. The MDNR permits are meant to ensure that dredging and filling activities will not violate state water quality standards, but because Missouri water quality standards are deficient, these permits do not protect wetlands from discharges and impacts.[62]

Wetlands provide a number of invaluable services, most important are flood control and water purification. According to EPA, wetlands provide between 1 and 1.5 million gallons of floodwater storage per acre.[63] For every acre of functional wetlands, over a million gallons of floodwater is abated. However, the services that wetlands provide are not sustainable without the assignment of beneficial uses to assure their protection. This is of particular importance considering Missouri's currently inadequate water quality standards and its relationship to the two largest rivers on the continent, the Missouri and Mississippi Rivers.

Numerous studies also document the existence of diverse aquatic life in wetlands.[64] The Missouri Department of Conservation states that the "diversity of wildlife species in Missouri's freshwater marshes is unmatched by any other type of habitat in the state."[65] Wetlands in Missouri are frequented by a number of shorebirds, including dowitchers, sandpipers, and

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[61] U.S. Envtl. Prot. Agency, *Water Quality Standards Handbook*, Transmittal Memo, v (1990), *available at* http://water.epa.gov/scitech/swguidance/standards/upload/2002_06_11_standards_handbook_handbookappxD.pdf.
[62] 10 CSR 20-6.060 (2012).
[63] U.S. Envtl. Prot. Agency, *Functions and Values of Wetlands*, EPA 843-F-01-002c (2001), *available at* http://water.epa.gov/type/wetlands/outreach/upload/fun_val_pr.pdf.
[64] Raymond D. Semlitsch & J. Russell Bodie, *Are Small, Isolated Wetlands Expendable?*, 12 CONSERVATION BIOLOGY 1129 (1998).
[65] *See* Mo. Dep't of Conservation, *Managing Wetlands*, MDCONLINE, http://www.mdc.mo.gov/landwater-care/wetlands-management/managing-wetlands (last visited Nov. 5, 2012).

yellowlegs, and are home to a number of invertebrates, amphibians, reptiles, fish, and mammals.[66] Unprotected wetlands and their decreased capacity for flood control and water purification increases the risk of losing these species and the benefits they provide in Missouri.

Numerous governmental and non-profit organizations have demonstrated both their desire and commitment to protecting Missouri's wetlands. Missouri is located along the Mississippi Flyway and is visited by thousands of migrating geese, ducks (especially mallard ducks), and other waterfowl during their annual migrations. Conservation group Ducks Unlimited has protected more than 86,000 acres of wetlands in Missouri to ensure that the birds are able to thrive.[67] Additionally, the Mingo Basin Partnership, a collaboration of 17 governmental and local conservation organizations, has worked to rehabilitate more than 21,000 acres in Missouri's Mingo Swamp Basin since 2009.[68] The partnership was awarded three million dollars in federal grants and provided an additional 10.6 million dollars in matching partner funds to restore the wetland as an important area for migratory waterfowl and land birds.[69] Despite the efforts of these organizations and the use of wetlands, like the Mingo Basin, by wildlife and aquatic life, Missouri wetlands have not been assigned any beneficial uses. Notably, the Mingo Basin Partnership includes MDNR which is responsible for the lack of wetlands protection and water quality standards in the first place.

The Coalition has created several maps showing wetlands and their connections to

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[66] *See* Mo. Dep't of Conservation, *Wetland Values*, MDCONLINE, http://www.mdc.mo.gov/landwater-care/wetlands-management/wetland-values (last visited Nov. 5, 2012).

[67] *Missouri Conservation Projects,* DUCKS UNLIMITED, http://www.ducks.com/missouri/missouri-projects (last visited Nov. 2, 2012).

[68] *The Mingo Basin Partnership,* MDCONLINE, http://mdc.mo.gov/blogs/duck-creek-ca-updates/tis-season (last visited Nov. 2, 2012).

[69] These numbers were calculated by summing the funding amounts allocated to the three different phases of the Mingo Basin Partnership Project:
Bird Habitat Conservation 2009, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/birdhabitat/Grants/NAWCA/Standard/US/2009_Sept.shtm.
Newsroom, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/midwest/News/release.cfm?rid=514.
Bird Habitat Conservation 2011, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/birdhabitat/Grants/NAWCA/Standard/US/2011_Sept.shtm (all last visited Nov. 2, 2012).

Missouri rivers, lakes and streams.[70] Since at least 2003, the Coalition has consistently asked that wetlands be protected through designation of default fishable/swimmable uses and corresponding numeric criteria. The State has continually ignored this request.

C. Missouri's Failure to Assign Uses to the Majority of its Waters Makes it Impossible for the State to Operate a Water Protection Program.

The State's failure to assign uses to its waters has serious implications for the Missouri's National Pollution Discharge Elimination System ("NPDES") permitting program. The CWA prohibits the discharge of any pollutant from a point source into any water of the U.S. unless the discharge complies with the other provisions of the Act.[71] One of those provisions, found in § 402(a), requires the discharger to first obtain a NPDES permit from the appropriate governmental agency, either EPA or the state if EPA has delegated permitting responsibilities to the state. The terms of the permits themselves must also comply with the relevant portions of the CWA and EPA regulations. For example, the NPDES permit must contain technology-based effluent limits.[72] The issuing government agency must also look at whether the technology-based limits are sufficient to prevent the discharger from violating state water quality standards or whether stricter standards are necessary.[73]

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[70] Exhibit 14 is a map that shows where wetlands from the National Wetlands Inventory ("NWI") are adjacent to either a National Hydrology Dataset High Resolution ("USGS NHDH") stream or river. Because the NWI includes Missouri's lakes, the currently classified lakes have been shown on this map as well to indicate which of these waters are currently protected under Missouri law. Although it is only possible to determine if a wetland is isolated or is an interconnected Water of the United States through a jurisdictional determination, it is clear that many hundreds of thousands of acres of wetlands in Missouri are interconnected waters. These waters should be afforded designated use protections and numeric water quality standards. The geospatial datasets used to compose this map are publicly available at www.msdis.missouri.edu, the NHDH can also be attained through the USGS at the website nhd.usgs.gov, and the NWI can be found at www.fws.gov/wetlands/Data/State-Downloads.html. In order to show the adjacent wetlands we used a GIS topology tool to select all of the wetlands from the NWI that are connected to a NHDH river or stream, then we repeated this process to select all of the wetlands bordering wetlands bordering the NHDH rivers and streams, and so on until the tool returned no selections—indicating that all of the interconnected wetlands adjacent to the NHDH had been selected.

[71] Specifically, sections: 301, 302, 306, 307, 318, 402 and 404. *See* 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, and 1344.

[72] 33 U.S.C. § 1311 (2011). 40 C.F.R. § 125.3 (2012).

[73] 33 U.S.C. § 1312 (2011). 40 C.F.R. § 122.44 (2012). This is a gross oversimplification of the permitting process,

However, most discharges are shielded from scrutiny in Missouri. Missouri operates its own NPDES program and currently has over 4,392 outfalls (permitted discharges) contained within 3,042 site-specific NPDES permits which discharge a variety of pollutants into lakes, rivers and streams.[74] Approximately 3,157 or 71.9% of these outfalls are into unclassified waters.[75] Because unclassified waters are not assigned uses, the unclassified rivers, streams, and lakes do not have numeric criteria associated with them. Without numeric criteria to govern the quantity and concentration of pollutants into the water, it is nearly impossible to determine whether an effluent discharge will have an effect on state water quality, unless the effluent causes an unmistakably apparent change (e.g., turns the water red).

Unlike NPDES permits in other states, most Missouri NPDES permits do not contain any water quality based limits. Missouri permits have only technology-based limits for certain pollutants—the lowest common denominator of water quality protection.[76] Without water quality based effluent limits it is impossible to effectively limit pollution discharges to protect fishable/swimmable uses.

When the Coalition and other members of the public have asked for more stringent effluent limits or inclusion of effluent limits protective of aquatic life or human health, the State has refused to establish them if the effluent discharges into an unclassified river, lake or stream. For example, the permit for the Gerald North lagoon contained technology-based treatment

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which also involves the Clean Water Act's anti-degradation rules. The crucial point is that without the assignment of uses and numeric water quality criteria, the permitting authority cannot determine the effluent's effect on the receiving stream and cannot calculate a water-quality based effluent limitation. The authority cannot compare it to the technology-based limit to determine whether it is more protective, and cannot take the receiving stream's water quality into account for anti-degradation purposes. *See, e.g.*, U.S. Envtl. Prot. Agency, *NPDES Permit Writers' Manual*, EPA-833-K-10-001, 6-22 (2010), *available at* http://www.epa.gov/npdes/pubs/pwm_2010.pdf.

[74] Crandall Decl. ¶ 16.

[75] *Id.* This figure was calculated by the Coalition using a GIS data layer provided by the Missouri Department of Natural Resources, all attached as Ex. 15: (A) NPDES GIS Shapefile, (B) Exported excel spreadsheet of data, and (C) Metadata.

[76] *See* 40 C.F.R. § 125.3(a). Many permits are in fact assigned even less stringent effluent limits.

effluent limits, restricting Biological Oxygen Demand ("BOD") and Total Suspended Solids. The permit did not contain numeric limits for most other pollutants, including pollutants like metals that harm aquatic life.[77] During the public comment period for the permit in February 2008, the Coalition requested the permit's effluent limits be updated with a more protective BOD limit to protect aquatic life.[78] MDNR declined, explaining, "[t]he receiving stream is an unclassified tributary of Cedar Fork and is 3.5 miles from the classified section of Cedar Fork. Consequently, the DO [dissolved oxygen] criteria does not apply."[79] No one had ever performed a scientific assessment on this stretch of the creek to determine whether it was capable of supporting fishable/swimmable uses. MDNR then presumed without any evidence that the water body did not and could not support aquatic life and refused to limit the discharge of pollutants harmful to aquatic life into the creek.

MDNR responded with the same inaction when the Coalition asked that bacteria limits be included in a permit to protect human health and recreation. The Coalition has commented on many public sewage treatment facility permits over the last five years and asked that fecal coliform limits be included in the permits to protect human health. Although discharges from sewage treatment plants unquestionably contain bacteria, MDNR refused to include these limits unless the discharges occurred within two miles of a classified stream assigned the whole body contact swimmable use. In response to a request for fecal coliform limits in the City of Clarence permit, the MDNR explained its position:

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[77] *See* Mo. Dep't of Natural Res., Draft Missouri State Operating Permit for Gerald North Lagoon, 4 (Jan. 25, 2008), attached as Ex. 16.

[78] Letter from Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic, to James A. Rhodes, Water Section Manager, Mo. Dep't of Natural Res. (Feb. 27, 2008), attached as Ex. 17.

[79] Letter from James A. Rhodes, Water Section Manager, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (Mar. 14, 2008), attached as Ex. 18. The final Gerald North Permit contained some monitoring provisions for metals, presumably to conduct reasonable potentials tests later if the state chose to do so. State Operating Permit for Gerald North Lagoon, at 3 (Mar. 21, 2008), attached as Ex.19. The final permit also contained some ammonia limits (ammonia as N), but the limits were not the ones that would have been imposed if the stream had been assigned a "fishable" use, such as the protection of aquatic life. *Id.* at 4.

> Regulation 10 CSR 20-7.015(8)(B)4.A. requires that discharges to a waterbody segment identified as a whole body contact recreation area or within two miles upstream of these areas be given fecal coliform effluent limitations. This facility is more than two miles upstream of the classified segment of the North Fork Salt River. Fecal coliform limits are not required for the City of Clarence discharges.[80]

These receiving waters should be assumed suitable for fishing and swimming, and treated as such by MDNR under EPA's rebuttable presumption. The permit should contain water quality based limits on the effluent discharge in order to keep the river safe for swimming. Under Missouri's presumption—which is not necessarily rebuttable—the receiving waters are presumed *unsuitable* for fishing and swimming, and are treated as such by the State. Missouri's failure to assign uses to unclassified waters ensures that the NPDES permits will not contain effluent limits that protect water quality as intended by federal law.

Missouri's presumption of unattainability also harms water quality in classified downstream segments because upstream waters may be unclassified and unregulated. If there is no numeric limitation on the City of Clarence's discharge of sewage into an unclassified tributary, that stream will likely be more polluted by the time it reaches a water body that is classified, thereby undermining the purpose of classification and assignment of uses.[81] Members of the public who use the classified waters experience those waters in a condition degraded by human activity and may be putting their health at risk. This situation frustrates regulatory enforcement because the upstream dischargers do not have water quality based limits in their permits, so it is unlikely that they are violating the terms of their permits. Accordingly, no further

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[80] Letter from Abbie Stockett, Environmental Specialist, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (Oct. 23, 2006). This was the State's standard reply. *See, e.g.*, Letter from Kevin Hess, Chief of Water Pollution Section, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (Feb. 26, 2007) (claiming that the State planned to convene a workgroup to discuss uses for unclassified waters); Letter from Gary L. Gaines, Regional Dir., Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (Oct. 1, 2007); Letter from Abbie Stockett, Environmental Specialist, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't (July 2, 2008), all attached as Ex.20.

[81] This is true with the exception of the 2-mile rule for bacteria limits. MDNR requires disinfection for discharges within 2 miles of a classified stream. MDNR does not apply the 2-mile rule for aquatic life protection although in a few recent permits ammonia limits have been included. *See* 10 CSR 20-7.015(1)(A)(3) (2012) and 10 CSR 20-7.015(8)(B)(4) (2012).

action can be taken through the NPDES program to improve water quality. At best, this disparity among permittees means that downstream dischargers releasing into classified portions might have stricter water quality based limits than they would if such limits were also imposed on upstream dischargers. At worst, the waters supposedly designated fishable/swimmable may not be safe for such activities and the public and state regulators alike are unable to address that issue.

Unclassified waters are ignored by MDNR's impaired waters program, just as they are treated as unregulated for purposes of NPDES permits. Section 303(d) of the CWA requires the states to identify any impaired waters—waters for which technology-based controls are not stringent enough to enable them to meet the water quality standards set by states for a particular pollutant.[82] Impaired waters must be ranked by priority and the state must establish the Total Maximum Daily Load ("TMDL") for that water.[83] A TMDL "is a calculation of the maximum amount of a pollutant that a water body can receive and still safely meet water quality standards," along with an allocation of that amount to the pollutant's sources.[84] Most of Missouri's waters are unclassified and thus excluded from this program, no matter how impaired those waters may be.

The following is just one example of how the ineffectiveness of the impaired waters program affects Missouri's rivers and streams. In January 2010, two Washington University scientists prepared a study analyzing water quality data for St. Louis area streams.[85] The results indicated that the impairment of St. Louis area streams for parameters relevant to human health

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[82] *Overview of Impaired Waters and Total Maximum Daily Loads Program,* U.S. ENVTL. PROT. AGENCY OFFICE OF WATER, *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/intro.cfm (last visited Nov. 2, 2012).
[83] *Id.*
[84] *Id.*
[85] Robert E. Criss & Elizabeth A. Hasenmueller, *Water Quality Report for Small Streams of the St. Louis Area* (2010), attached as Ex. 21.

(bacteria) and aquatic life (dissolved oxygen) was "widespread and surprisingly uniform."[86] The authors noted that very few of these waters had been placed on the § 303(d) list of impaired waters, and observed the following:

> Selected reaches of St. Louis' creeks have been placed on the EPA 303d list for high chloride (e.g., River des Peres), high bacteria (e.g., Creve Coeur Ck.), or low D.O (e.g., Fishpot Ck.), and some for all three (e.g., Coldwater Ck. and Gravois Ck.; see MoDNR, 2009a). The available USGS data indicate that most creeks in the St. Louis area are as impaired in these parameters as are those listed examples . . . .[87]

The authors also "witnessed several examples of children and livestock wading or swimming in unclassified reaches of area creeks, as well as the widespread use of these streams by waterfowl and other wildlife." They asked that water quality standards be applied to these creeks and streams as a matter of public health.[88]

MDNR responded to this data by declining to add the described waters to its § 303(d) list, even though these waters had levels of chloride, E. coli or dissolved oxygen that were the same or higher than waters already listed as impaired for these pollutants. The State's rationale was that the waters were unclassified as a matter of Missouri regulations, and a water cannot fail to meet a water quality standard if no standard is assigned to the water.[89]

Kiefer Creek, one of the St. Louis County streams mentioned in the study above, provides another example of how the failure to designate uses undermines other aspects of Missouri's water protection program. Kiefer Creek flows through Castlewood State Park, a park

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[86] *Id.* at 329.
[87] *Id.*
[88] *Id.* at 329-30.
[89] Letter from John Ford, Water Quality Assessment Unit Chief, Mo. Dep't of Natural Res., to Robert Criss, Professor, Washington Univ. 1 (Aug. 9, 2010), attached as Ex.22.

that attracts over 500,000 visitors per year.[90] A significant amount of these visitors swim in Kiefer Creek throughout the recreational season. Kiefer Creek has achieved local notoriety because this popular recreational water has been shown to have extremely high E. coli levels, posing a significant health concern.[91]

The majority of the perennial and intermittent flows that comprise Kiefer Creek are unclassified, like many other St. Louis County streams. The creek only becomes classified where it enters Castlewood State Park.[92] Data collected by the United States Geological Survey ("USGS") between 1996 and 2004,[93] showed that the main branch of the creek has bacteria levels in excess of the numeric criteria for whole body contact recreation. This data was collected ¼ mile upstream from where the classified segment begins. The data was never used to designate Kiefer Creek as impaired for recreation, despite proximity to the classified segment and collection from a spring-fed, losing stream with perennial flow. Furthermore, warning signs were only posted recently to warn people who swam in the creek in Castlewood State Park of the risks to their health.[94] When the Coalition requested that MDNR use the data to protect public health or designate the creek as impaired for recreation, MDNR responded that because the data was collected from the unclassified segment of Kiefer Creek, it was not subject to their review or

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[90] Missouri State Parks, *Missouri State Park Attendance for January-December 2011* (2012), *available at* http://mostateparks.com/sites/default/files/attend%202011.pdf.

[91] *See, e.g.*, Nadia Pflaum, *Missouri's E. Coli problems are not confined to the Lake of the Ozarks*, RIVERFRONT TIMES, June 16, 2010, *available at* http://www.riverfronttimes.com/2010-06-16/news/deep-doo-doo-missouri-e-coli-problems-not-confined-to-lake-of-the-ozarks/.

[92] *See* Kiefer Creek map created by the Coalition, attached as Ex. 23.

[93] *See* U.S. Geological Survey, *Water Quality Samples for Missouri: Kiefer Creek near Ballwin, MO* (2012), *available at* http://nwis.waterdata.usgs.gov/mo/nwis/qwdata/?site_no=07019072&agency_cd=USGS&inventory_output=0&rdb_inventory_output=value&TZoutput=0&pm_cd_compare=Greater%20than&radio_parm_cds=all_parm_cds&format=html_table&qw_attributes=expanded&qw_sample_wide=separated_wide&rdb_qw_attributes=expanded&date_format=YYYY-MM-DD&rdb_compression=file&submitted_form=brief_list.

[94] *See* Stephen Deere, *Castlewood Creek Popular Despite E. Coli Levels*, ST. LOUIS POST DISPATCH, July 27, 2010, *available at* http://www.stltoday.com/news/local/metro/castlewood-creek-popular-despite-e-coli-levels/article_5cb5174a-cf7e-5c51-a3b7-ab78009b0ae6.html.

consideration.[95] More recent data from the local sewer authority, collected in 2009, has also indicated that bacteria levels in the creek on the classified segment exceed the safe level for whole body contact recreation.[96] The Coalition brought this data to the attention of MDNR in 2010.[97] Fourteen years after the high bacteria levels were discovered by the USGS, Kiefer Creek was added to Missouri's CWA § 303(d) list for impaired waters and signs have been posted to warn the public of the creek's impairment for recreation.[98] If this highly valued water, flowing through public land where it is readily accessible for recreation had been placed on the § 303(d) list when unsuitable bacteria levels were first discovered, thousands of trusting visitors could have been better protected and safeguards could have been implemented sooner to begin restoring water quality.

D. All Parties Acknowledge the Current State of Missouri Waters.

The facts described in this Petition are not disputed. At the March 9, 2012 Clean Water Commission meeting, EPA Region 7's Director of Water, Wetlands and Pesticides highlighted the failures of Missouri's water quality standards. She pointed out:

> There are important environmental and human health benefits to designating uses for all unclassified waters. Currently over 2,000 or 80% of Missouri NPDES permitted discharges are into unclassified rivers and streams. So this means that pathogen water quality criteria to protect against gastrointestinal and other waterborne illnesses and numeric human health criteria to protect for fish consumption are not in place for these waters. And in addition, the chronic numeric criteria to protect aquatic life are not in place for unclassified waters. So in short, for the vast majority of the waters in Missouri protections are not in place

[95] *See* E-mail from John Ford, Watershed Protection Section, Mo. Dep't of Natural Res., to Lorin Crandall, Clean Water Program Dir., Mo. Coal. for the Env't, at 3 (May 26, 2010, 07:20 AM CST), attached as Ex. 24.
[96] *See* St. Louis Metro. Sewer Dist., *Kiefer Creek E. coli Data Collected from 2000 to 2009,* (2009) Excel spreadsheet, attached as Ex. 25.
[97] Crandall Decl. ¶14 and E-mail from Lorin Crandall, Clean Water Program Dir., Mo. Coal. for the Env't, to John Ford, Mo. Dep't of Natural Res. (July 28, 2010, 04:57 PM CST) and comment letter PowerPoint presentation, attached together as Ex. 26.
[98] *See* Stephen Deere, *Castlewood Creek Popular Despite E. Coli Levels,* ST. LOUIS POST DISPATCH, July 27, 2010, *available at* http://www.stltoday.com/news/local/metro/castlewood-creek-popular-despite-e-coli-levels/article_5cb5174a-cf7e-5c51-a3b7-ab78009b0ae6.html.

to ensure that the waters are safe for swimming, recreation and fishing.[99]

Missouri's failure to protect its waters and comply with the requirements of the Clean Water Act is not accidental. Missouri is aware of the problem, but has made it clear that it will take no action to designate uses for the "vast majority" of its waters unless it is forced to do so by a lawsuit, a consent decree, or EPA itself.

V. HISTORY OF MISSOURI'S NON-COMPLIANCE AND INACTION

Missouri has been out of compliance with the Clean Water Act for almost 30 years, so there are many points where one could begin the long story of Missouri's refusal to heed the obligations of federal law and protect its waters. We will discuss Missouri's recent history beginning with EPA's September 8, 2000 letter informing MDNR that it was out of compliance with the CWA.

A. EPA Region 7 Warned Missouri That It Must Assign Uses to Its Waters in Order to Comply With the Clean Water Act.

Missouri has historically disregarded the CWA requirement for states to review water quality standards every three years[100] and submit those standards to EPA for approval.[101] However, in 1994 and 1996 MDNR revised some of its water quality standards and sent them to EPA's Regional Office for approval.[102] EPA's Region 7 Administrator responded to Missouri's water quality standards several years later with a letter to state regulators dated September 8, 2000. The EPA's letter highlighted the failings and deficiencies of Missouri's water quality

[99] Karen Flournoy Comment, Video *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 53'16", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.

[100] 33 U.S.C. § 1313(c)(1) (2011). States are required to review their water quality standards at least once every three years and, if appropriate, revise or adopt new standards.

[101] 33 U.S.C. § 1313(c)(2)(A). States are required to submit the results of their triennial reviews to EPA for approval.

[102] Letter from U. Gale Hutton, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7, to Stephan Mahfood, Dir., Mo. Dep't of Natural Res. 1 (Sept. 8, 2000), attached as Ex. 27.

standards. The letter also clearly reiterated the national goal of water quality to protect fishable/swimmable uses and the rebuttable presumption that such uses are attainable on all waters of the U.S.:

> Section 303(c)(2)(A) requires water quality standards to "protect the public health and welfare, enhance the quality of water, and serve the purposes of this Act." EPA's regulations at 40 C.F.R Part 131 interpret and implement these provisions by requiring that water quality standards provide for fishable/swimmable uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. The mechanism in EPA's regulations used to overcome the default designation of fishable/swimmable (i.e., the rebuttable presumption) is a use attainability analysis.
>
> Under 40 C.F.R. § 131.10(j), States are required to conduct a use attainability analysis (UAA) whenever the State designates or has designated uses that do not include the uses specified in section 101(a)(2) of the CWA, or when the State wishes to remove a designated use that is specified in section 101(a)(2) of the Act, or adopts subcategories of uses that require less stringent criteria.[103]

The Administrator also observed that Missouri law was inconsistent with this standard:

> [I]t is the Agency's view that the States must protect unclassified or unlisted waters as well as classified waters for that default use. We note that although unlisted (i.e., unclassified) waters are protected by the general criteria in the Water Quality Standard, there is no clear default use-designation language in Missouri's WQS's for "unclassified waters."[104]

The Region 7 Administrator indicated that EPA wanted to discuss this failing during Missouri's next triennial review.[105]

B. Missouri Disregarded EPA's Warning and Took No Effective Action on Missouri's Water Quality Standards.

Following EPA's September 2000 letter, MDNR did not revise its water quality standards to address the non-compliance issues highlighted by EPA. MDNR made promises to revise its standards and set several compliance deadlines, but MDNR never fulfilled those promises and never met those deadlines. Several months after receiving EPA's letter, MDNR finally

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[103] *Id.* at 22.
[104] *Id.* at 29.
[105] *Id.*

acknowledged EPA's disapproval of Missouri's water quality standards and EPA's threat of involving the Administrator.[106] In a letter, dated March 8, 2001, MDNR presented its plan for "addressing the deficiencies identified as well as other opportunities future revisions present."[107] MDNR labeled its three-phase plan "Missouri Water Quality Standards Revisions Plans 2001-2003."[108] The first phase of the revision was slated to start in the spring of 2001 and conclude with a decision by Missouri's Clean Water Commission on a proposed rule revision in the fall of 2001.[109] This was just the beginning of a series of empty promises that Missouri would make to appease EPA and delay compliance with the CWA. Missouri held a series of public stakeholder meetings in 2001 to discuss the course of action necessary to comply with federal standards.[110] These meetings resulted in no further action and Missouri water quality standards were not revised in 2000, 2001, 2002, or 2003.

While MDNR promised EPA that they were taking action to fix Missouri's water quality standards, they were in fact still considering their options, including the option of doing nothing at all.[111] On February 28, 2002, about a year after MDNR presented its plan of action to EPA and months after its Phase I deadlines had passed, MDNR staff met and discussed not revising the water quality standards. Staff internally noted that doing nothing would make EPA "much more

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[106] Letter from John A. Young, Dir. of Envtl. Quality, Mo. Dep't of Natural Res., to U. Gale Hutton, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7 (Mar. 8, 2001), attached as Ex. 28.
[107] *Id.* at 1.
[108] *Id.* at 4.
[109] *Id.* at 2.
[110] *See Id.* at 1 ("We plan to convene a large group of stakeholders to review and discuss potential changes before they are filed as proposed state rules."); E-mails between Becky Shannon, Chief of Water Quality Section, Mo. Dep't of Natural Res., and Scott Totten, Dir. Water Protection Program. Mo. Dep't of Natural Res. (Feb. 28-Mar. 2, 2002) (discussing public meetings), attached as Ex. 29; Letter from Stephen Mahfood, Dir., Mo. Dep't of Natural Res., to Edward Heisel, Senior Law & Policy Coordinator, Mo. Coal. for the Env't 2 (July 21, 2003) (discussing stakeholder meetings during Phase I rulemaking revisions), attached as Ex. 34.
[111] *See* E-mails between Becky Shannon, Chief of Water Quality Section, Mo. Dep't of Natural Res., and Scott Totten, Dir. Water Protection Program, Mo. Dep't of Natural Res. (Feb. 28, 2002, 04:07 PM CST), attached as Ex. 29; Memorandum from Mo. Dep't of Natural Res. on Proposed Revisions to Whole Body Contact Use Designations (Mar. 27, 2003) (acknowledging the fishable/swimmable requirement and proposing options to deal with the inadequacy of the existing law, including the option of not doing anything), attached as Ex. 30.

susceptible to litigation" and would make Missouri "look pretty darned bad" considering MDNR already told EPA and the public that it was taking action.[112] In an e-mail on March 1, 2002, MDNR employees discussed EPA promulgation and suggested that staff delay the process by providing EPA with some plans for revisions.[113] On March 8, 2002, Missouri sent a letter to EPA delaying its rulemaking process, but assuring EPA that it had a plan to finalize a rule and designate all waters of the U.S. "swimmable" by July 1, 2002.[114] The letter also asserted the State's belief that the "brief delay in publishing the rule" would result in more effective implementation once the rule was completed.[115] MDNR never finalized a rule in 2002, despite its commitments to EPA and the public, its legal obligation, and legal risks. Two years after EPA's September 8, 2000 letter, MDNR had not even prepared a proposed rule.

By early 2003, it was apparent that MDNR was not planning to address the numerous failings identified by EPA in September of 2000. Frustrated with the State's inaction, the Coalition contacted MDNR directly on March 4, 2003 in an attempt to encourage the State to initiate the rulemaking necessary to enact water quality standards compliant with the CWA.[116] Months passed without a response and the State continued to evade its responsibilities regarding water quality standards.

C. The Coalition Filed Its First Suit and Reached Settlement Without Resolving All Water Quality Issues.

The Coalition sent a Notice of Intent to Sue to EPA on July 2, 2003 for EPA's failure to promulgate standards necessary to meet the requirements of the CWA in Missouri, and sued

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[112] *See* E-mails between Becky Shannon, Chief of Water Quality Section, Mo. Dep't of Natural Res., and Scott Totten, Dir. Water Protection Program, Mo. Dep't of Natural Res. (Feb. 28, 2002, 04:07 PM CST).
[113] *See* E-mails between Becky Shannon, Chief of Water Quality Section, Mo. Dep't of Natural Res., and Scott Totten, Dir. Water Protection Program, Mo. Dep't of Natural Res. (Mar. 1, 2002, 07:26 AM CST).
[114] Letter from Scott Totten, Dir. Water Protection Program , Mo. Dep't of Natural Res., to Cheryl Crisler, Chief of Water Res. Prot., Envtl. Prot. Agency Region 7 (Mar. 8, 2002), attached as Ex. 31.
[115] *Id.*
[116] Letter from Edward Heisel, Senior Law & Policy Coordinator, Mo. Coal. for the Env't, to Stephen Mahfood, Dir., Mo. Dep't of Natural Res. (Mar. 4, 2003), attached as Ex. 32.

EPA Administrator Marianne Horinko on October 6, 2003.[117] Count Fourteen of the suit addressed EPA's failure to promulgate standards to rectify the inconsistencies in Missouri's water quality standards identified in EPA's September 8, 2000 letter, specifically the State's failure to assign fishable/swimmable uses to all waters of the U.S. within its borders.[118]

In late July 2003, MDNR finally explained its delay in revising water quality standards, stating that, "the process for revising rules is cumbersome."[119] MDNR then assured the Coalition that rulemaking was underway which would result in a proposed rule in early 2004.[120] Unfortunately, MDNR's "assurance" was another empty promise. The early 2004 deadline came and went with no action, despite the pending lawsuit.

Following extensive negotiations, EPA and the Coalition entered into a joint consent decree and settlement agreement to resolve the litigation in December 2004. Deadlines were set to compel Missouri to rectify its non-compliant water quality standards identified in the September 8, 2000 letter. In exchange for relief on 15 of the 16 claims, the Coalition agreed to dismiss its claims regarding unclassified waters. In effect, the Coalition agreed to allow EPA to postpone designating default uses for the majority of Missouri's waters and the Coalition planned to continue to work with Missouri and EPA to develop a CWA compliant rule. At the time, the Coalition could never have foreseen that eight more years would elapse without any action by the State or EPA to designate uses for Missouri's unclassified waters.

D. Missouri Failed to Assign Default Fishable/Swimmable Uses in its 2005 and 2009 Triennial Reviews.

In 2005, Missouri submitted its first triennial review since 1996. Threatened with EPA

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[117] Compl., *Mo. Coal. for the Env't v. Horinko*, No. 03-4217-CV-C-NKL (W.D. Mo. Oct. 6, 2003), attached as Ex. 33.
[118] *Id.*, ¶¶ 122-28.
[119] Letter from Stephen Mahfood, Dir., Mo. Dep't of Natural Res., to Edward Heisel, Senior Law & Policy Coordinator, Mo. Coal. for the Env't 2 (July 21, 2003), attached as Ex. 34.
[120] *Id.*

action in the settlement agreement, the State made substantial changes to its water quality standards for the first time in almost a decade.[121] It assigned a whole body contact use to all of the classified waters for which some uses had been designated and no UAA had been performed.[122] Unfortunately, the State did not assign default uses to its unclassified waters. The Coalition objected to Missouri's proposed amendments because they failed to address unclassified waters. The Coalition also petitioned EPA to disapprove state water quality standards and promulgate revised standards assigning fishable/swimmable uses to all waters of the U.S. within Missouri.[123] Both EPA and the State ignored the Coalition's requests to include unclassified waters in this rulemaking. EPA Region 7 eventually approved and disapproved various portions of the rule without addressing default uses for unclassified waters or responding to the Coalition's petition.[124]

In 2008, Missouri proposed additional changes to its water quality standards. It assigned uses to a few waters, but neglected the majority of unclassified waters—including nearly 80% of the state's streams—leaving them unprotected by use designations. Again, the Coalition—in a comment letter and testimony—objected to the failure to assign uses to these waters and reminded MDNR that its water quality standards involving classification were inconsistent with the CWA.[125] The State's reaction is aptly summarized in a letter from Edward Galbraith, Director of the Water Protection Program, in which he stated that assigning presumptive uses to all waters of Missouri posed "technical and legal challenges that are not so easily overcome" and

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[121] *See* Settlement Agreement, ¶ 3, attached as Ex.3.
[122] Order of Rulemaking, *supra* note 39. *See also* Letter from Betty Berry, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7, to Doyle Childers, Dir., Mo. Dep't of Natural Res. 15 (Apr. 28, 2006), attached in Ex. 35.
[123] *See* Letter from Edward Heisel, Exec. Director, Mo. Coal. for the Env't, to Leo Alderman, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7 (Oct. 17, 2005), attached as Ex. 36.
[124] Letters from EPA to Doyle Childers, Dir., Mo. Dep't of Natural Res. (April 28, 2006) (October 31, 2006) and (February 20, 2007), all attached as Ex. 35.
[125] *See* Letter from Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic, to Phil Schroeder, Chief of Water Quality Monitoring and Assessment, Mo. Dep't of Natural Res. (Oct. 15, 2009), attached as Ex. 37.

that "assign[ing] the default use to all unclassified waters would place unnecessary burdens on dischargers .... [W]e are opposed to any presumptive approaches that would assign protections more broadly than reasonably necessary."[126]

Missouri submitted a triennial review to EPA in 2009 without fishable/swimmable designated uses for unclassified waters despite the Coalition's protests. Almost a decade after EPA highlighted the importance of assigning uses to Missouri's unclassified waters, and identified it as a topic for the "next triennial review," Missouri refused to assign those uses.

E. Continued Efforts by the Coalition and EPA to Work With Missouri Have Not Yielded Results.

MDNR convened the Small Streams Work Group after the 2005 triennial review and invited interested parties to attend stakeholder work group meetings and propose language for a default rule for unclassified streams. The Coalition participated in the work group and proposed default use rule language. MDNR then disbanded the work group in late 2006 without any effort to enact regulatory language created in the work group process. The group re-started in 2007 and an EPA employee, who participated in the work group, informed the work group leader that default uses would be necessary for Missouri's unclassified waters and suggested that the group look at the language adopted by other states.[127] Shortly after this suggestion, MDNR disbanded the work group again.

In 2009, MDNR reconvened the Small Streams Work Group and it met several times that year. At one meeting, the Coalition presented evidence showing that Missouri's initial suggestion to apply the fishable/swimmable standard to only a subset of its unclassified waters would leave

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[126] Letter from Ed Galbraith, Dir. of Water Prot. Program, Mo. Dep't of Natural Res., to Dan Sherburne, Research Dir., Mo. Coal. for the Env't, and Kathleen Smith, Exec. Dir., Mo. Coal. for the Env't (July 8, 2008), attached as Ex. 38.

[127] *See* E-mail from Rebecca Landewe, Envtl. Prot. Agency Region 7, to Phil Schroeder, Chief of Water Quality Monitoring and Assessment, Mo. Dep't of Natural Res. (Nov. 19, 2007, 03:58 PM), attached as Ex. 39.

many other waters supporting aquatic life unprotected.[128] As a result of further deliberations amongst this workgroup of diverse agencies and interests, the State proposed a rule that would have extended the fishable/swimmable uses to all waters of Missouri at the September 2009 Commission meeting.[129] The State's rule, informed by the workgroup process, encompassed an even broader designation than waters of the U.S. within Missouri.[130]

The Coalition traveled to EPA Region 7 headquarters in November 2009 to ensure that EPA was engaged in the rulemaking progress because the Coalition was concerned about Missouri backsliding on its recent progress in the workgroup. The Coalition followed up on its meeting with another petition to EPA providing additional scientific support and evidence of human recreation and aquatic life in unclassified streams.[131] The petition highlighted the necessity of EPA promulgation of revised water quality standards for Missouri to achieve compliance with the requirements of federal law.[132] EPA Region 7 personnel declined the Coalition's request to require MDNR to assign default uses to Missouri's waters and simply asked the Coalition to continue to work directly with the state.

On March 3, 2010, MDNR moved forward with the rulemaking process designed to create an amendment by December 2012 by asking the Clean Water Commission for a Finding of Necessity for a draft rule that proposed to assign fishable/swimmable designated uses to all Missouri waters. The Clean Water Commission refused to make the finding and asked for some additional information about the proposal, tabling it until the next Commission meeting.[133]

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[128] Dan Sherburne, Mo. Coal. for the Env't Presentation to Small Streams Work Group, PowerPoint presentation (Feb. 21, 2009), attached as Ex. 40.
[129] *See* Draft, 10 C.S.R. 20-7.031 (September 2009), attached as Ex. 41.
[130] *See* Letter from Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic, to Phil Schroeder, Chief of Water Quality Monitoring and Assessment, Mo. Dep't of Natural Res. (Oct. 15, 2009), attached as Ex. 37.
[131] *See* Letter from Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic, to William Rice, Acting Reg'l Adm'r, Envtl. Prot. Agency Region 7 (Dec. 4, 2009), attached as Ex. 42.
[132] *Id.*
[133] *See* Transcript of Missouri Clean Water Commission Meeting (Mar. 3, 2010), attached as Ex. 43. The discussion

MDNR withdrew the proposed rule from consideration in May 2010 following the challenge and without further explanation. [134] The Small Streams Work Group never met again.

At the end of April 2010, the Coalition once again asked EPA Region 7 to take action and compel the state to assign uses to its unclassified waters.[135] EPA Region 7 Administrator responded to the Coalition's letter on May 28, 2010 and clarified EPA's intention to continue working through the state process.[136] The Administrator stated, "we expect the State to move forward expeditiously with promulgating regulations to address unclassified waters as part of the upcoming Triennial Review."[137]

F. Coalition Filed a Second Suit to Compel the Assignment of Uses to Missouri's Unclassified Waters.

On August 4, 2010, the Coalition sent a Notice of Intent to Sue EPA over its failure to determine whether Missouri's 2009 triennial review was in compliance with the Clean Water Act.[138] At the same time, the Coalition filed suit against EPA Administrator Lisa P. Jackson and EPA under the Administrative Procedure Act[139] for arbitrarily and capriciously failing to fulfill the duty to ensure that Missouri's water quality standards complied with the Clean Water Act[140]

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in the transcript is a microcosm of Missouri's regulatory history. Missouri Department of Natural Resources proposed a rule assigning fishable/swimmable uses to unclassified waters under threat of a lawsuit from the Coalition. *Id.* at 72-75. EPA pointed out that the Clean Water Act required Missouri to take this action. *Id.* at 109. Representatives of dischargers argued against this step, claiming that it was just "common sense" that these waters should not receive fishable/swimmable uses, that it was too expensive to comply with federal law, and that MDNR was not prioritizing correctly. *Id.* at 95; 103; 89-90. The Commission then refuses to make a Finding of Necessity for fishable, swimmable designated uses. *Id.* at 111-12.

[134] Transcript of Clean Water Commission Meeting, 3-4 (May 5, 2010), attached as Ex. 44.

[135] Letter from Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic, to Karl Brooks, Reg'l Adm'r, Envtl. Prot. Agency Region 7 (Apr. 29, 2010), attached as Ex. 45.

[136] Letter from Karl Brooks, Reg'l Adm'r, Envtl. Prot. Agency Region 7, to Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic (May 28, 2010), attached as Ex. 46.

[137] *Id.* at 1.

[138] Notice of Intent to Sue from Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic, to Lisa Jackson, Adm'r, Envtl. Prot. Agency (Aug. 4, 2010), attached as Ex. 47.

[139] 5 U.S.C. § 706(1) (2011).

[140] 33 U.S.C. § 1313(c) (2011).

in 2005.[141]

After months of settlement discussions, the Coalition and EPA could not reach an agreement and decided to wait for the court's ruling. On February 16, 2012, the United States District Court for the Western District of Missouri ruled on the Coalition's claims. The Court found that Missouri's water quality standards were inconsistent with the Clean Water Act and entered a declaratory judgment to this effect.[142] Judge Laughrey plainly stated in the opinion that "many of the waters within [Missouri] remain unprotected with the required fishable/swimmable default uses, and there is no evidence that a use attainability analysis has been performed on these waters…."[143] The Judge further reaffirmed that the assignment of fishable/swimmable uses to state waters is a *minimum* requirement of the Clean Water Act.[144] However, the judge also found that EPA had no enforceable obligation under § 303(c)(4)(A) to promulgate a new rule that would bring Missouri into compliance, and that the Coalition could not use the federal court system to compel EPA to act under § 303(c)(4)(B).[145] EPA acknowledged that "[t]he court's decision…in the Missouri Coalition case clearly affirmed that the state has the responsibility and obligation under the Clean Water Act to promulgate water quality standards for its unclassified waters."[146]

G. The State Finally Proposed a Water Quality Rule in 2011 But It Failed to Meet Clean Water Act Requirements.

Before the lawsuit was resolved, the State attempted an end run around a potentially negative court ruling, suggesting that Judge Laughrey allow it to enact its own regulation and

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[141] Compl., *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903 (W.D. Mo. 2012), attached as Ex. 48.
[142] *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903, 904 (W.D. Mo. 2012).
[143] *Id.* at 908.
[144] *Id.* at 912.
[145] *Id.* at 908-09.
[146] Karen Flournoy Comment, Video *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 50' 37"-57'27", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.

avoid court or EPA intervention.[147] The proposed regulation, known as the "100K rule," purported to apply fishable/swimmable uses to all waters shown on the United States Geological Survey National Hydrography Dataset 1:100,000 scale map.[148] The regulation did not assign fishable/swimmable uses to all unclassified waters of the U.S. in Missouri, despite the State's assertion to the contrary.[149] As noted above, Judge Laughrey did not entertain the State's suggestion that the lawsuit be placed on hold. The State withdrew the 100K rule shortly after she ruled on the parties' motions.

The State has revived a variation of the 100K rule from the summer of 2011 in its November 21, 2012 RIR[150] and will again argue that there is no need for federal intervention because state regulation is sufficient. However, the 100K rule contains numerous flaws.

The most obvious flaw of such a rule is that it *still* would not employ EPA's rebuttable presumption of fishable/swimmable and the waters not appearing on the map would still be unclassified and unprotected by the CWA. The proposed 100K rule did not cover all EPA jurisdictional waters within Missouri and EPA Region 7 submitted a statement to this effect during the public comment period.[151] The Director of Water, Wetlands and Pesticides for EPA Region 7 spoke at a Clean Water Commission meeting on March 9, 2012, where she stated that the 100K rule would have assigned fishable/swimmable uses to "far more waters in the State"[152] and would have "greatly expand[ed] the number of waters in Missouri that have the appropriate

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[147] Intervenor's Resp. to Mots. for Summ. J. at 2, 4-5, *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903 (W.D. Mo. 2012), attached as Ex. 49.

[148] Mo. Dep't of Natural Res., *Regulatory Impact Report: An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards* (June 3, 2011), attached as Ex. 50. 100K Map, attached as Ex. 55. The scale of the map is one map inch equals 100,000 real inches.

[149] *Id.* at 2 (claiming that the 100K rule "appl[ied] 'fishable/swimmable' use designations to currently unclassified waters as required by Section 101(a) of the federal Clean Water Act.").

[150] *Water Protection Program Rule Development*, MISSOURI DEPARTMENT OF NATURAL RESOURCES, http://dnr.mo.gov/env/wpp/rules/wpp-rule-dev.htm, (last visited November 28, 2012).

[151] Letter from Karen Flournoy, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7, to John Hoke, Mo. Dep't of Natural Res. (Jan. 18, 2012), attached as Ex. 51.

[152] Karen Flournoy Comment, Video *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 50' 37"-57'27", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.

Clean Water Act water quality standards."[153] However, she also emphasized, "it *doesn't* cover all of the waters."[154]

This is readily apparent. At least 73,730 miles of streams governed by the CWA would remain undesignated under the proposed 100K rule.[155] About 40% of Missouri's rivers and streams, and all of its wetlands would have remained unprotected by uses, although fishable/swimmable uses would have been applied to an additional 84,845 stream miles, raising the total mileage of classified streams to 109,870[156]. Had the 100K rule been enacted, the State's water quality standards would have still been in clear violation of the CWA's fishable/swimmable provision.

A good illustration of how the 100K rule would fail Missouri citizens is the Menke family's lake on their property in Franklin County. The Menkes' lake is connected to Big Berger Creek by an unclassified tributary stream that would not have been assigned a use under the 100K rule or even a rule based on the higher resolution 24k National Hydrography Dataset.[157] This tributary has flow substantial enough to support the six-acre lake and also a significant wetlands complex; this small sub-basin appears to be fed by surface runoff and spring flows. The Menkes' lake has been grossly polluted – plagued by bacteria problems, choked by poisonous algae,[158] and subjected to fish kills.[159] A lake that was once a swimming hole enjoyed by generations of the Menke family became a degraded cesspool, unsafe for

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[153] *Id.*
[154] *Id.*
[155] *See* John Hoke, Mo. Dep't of Natural Res. Presentation to the Missouri Small Streams Advisory Group, PowerPoint presentation, slide 20 (Jan. 15, 2009), attached as Ex. 2; Regulatory Impact Report in Preparation for Proposing *An Amendment to 10 CSR 20-7.031, Water Quality Standards* (June 3, 2011), attached as Ex. 50. This number results when subtracting the miles of streams visible on the 1:100,000 National Hydrography Dataset set forth in the Regulatory Impact Report from the streams visible on the 1:24,000 NHD as set forth in the Presentation by John Hoke.
[156] Regulatory Impact Report (RIR) in Preparation for Proposing *An Amendment to 10 CSR 20-7.031, Water Quality Standards* (June 3, 2011), attached as Ex. 50.
[157] Menke Lake 100K Map, attached as Ex. 52.
[158] Kevin Menke, Log of Events with Menke Lake Pollution, 12 (Jan. 15, 2010), attached as Ex 53.
[159] *See* Video, *Menke Lake Fish Kill*, YOUTUBE (Feb. 14, 2009), http://www.youtube.com/watch?v=ndqmKwELvrk.

swimming and incapable of sustaining an aquatic ecosystem. The Menkes were unable to obtain relief under Missouri's water quality standards because the tributary is unclassified, despite the fact that the lake, wetlands, and tributary are all waters of the U.S. The Menkes knew that a small, unregulated hog Concentrated Animal Feeding Operation ("CAFO") was the upstream source of the pollution, but under Missouri's current regulations, the upstream dischargers were not subject to water-quality based limits and so they never obtained an NPDES discharge permit.

Despite repeated efforts by the Menkes to request MDNR action[160] on this egregious violation of the Clean Water Act, neither the tributary nor the lake were placed on the impaired waters list and their inflows were not regulated through the imposition of a TMDL requirement. Under a default rule embodying the rebuttable presumption, the Menkes' lake would be protected and they would have regulatory recourse against the lake's polluters. A 100K rule would not accomplish these goals.

Ultimately, the Menkes' Lake began to show the first signs of a long recovery because the polluting CAFO shut down last year due to the age and health of the owner/operator. This minimal relief could be short-lived because Missouri has done nothing to ensure the CAFO will not start operation again under a new owner. Thousands of Missouri land owners and stewards just like the Menkes, will continue to be excluded from the protections promised by the CWA until a default rule is in place.[161]

A 100K rule would not protect headwater streams, which would negatively affect downstream waters visible on the 100K map. The concentration of pollutants (from both point and non-point sources) increases significantly as the tributaries coalesce into a larger water body

[160] Kevin Menke, Log of Events with Menke Lake Pollution (Jan. 15, 2010), attached as Ex 53.
[161] Crandall Decl. ¶ 12, attached as Ex. 1.

due to the dendritic nature of waterways in a headwater system. Thus, unhealthy headwaters coincide with poor downstream water quality and a 100K rule does not take this fact into account.

Moreover, as the Coalition noted in its comment letter and testimony on the proposed 100K rule, the rule would have excluded protection of aquatic life in many headwater ecosystems of high ecological importance.[162] Headwaters provide habitats for a diverse range of aquatic species, from amphibians to macroinvertebrates, and "healthy headwater systems are critical to the healthy functioning of downstream streams, rivers, lakes and estuaries."[163] Missouri's current water quality standards do not protect the aquatic life described and the 100K rule would not have protected it either.

Finally, any 100K rule inadequately identifies existing water bodies. The map used by Missouri in the Regulatory Impact Report ("RIR") was created at a low resolution with expired cartographic methods.[164] Even if a better map is used for a 100K rule, there would still be gaps in data collection and the rule would exclude many vital headwater streams as well as the majority of lakes and wetlands. The attached maps appear to show that rivers and streams are more sparse in the northwestern and southwestern corners of Missouri. However, rivers and streams are just as present in these parts of the state. The 100K map and the dataset on which it is based simply do not present all streams in comparable detail. Accordingly, inconsistencies in mapping from

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[162] Letter from Elizabeth Hubertz, Attorney, Washington Univ. Interdisciplinary Envtl. Clinic, to John Hoke, Mo. Dep't of Natural Res. (Jan. 18, 2012), attached as Ex. 54. As noted, the proposed amendments to 10 CSR 20-7.031 never became final, meaning that all of the waters and the aquatic species dependent upon them, as described in the letter, are still unprotected.

[163] Judy L. Meyer et al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, AMERICAN RIVERS AND SIERRA CLUB, 4 (Feb. 2007), *available at* http://www.americanrivers.org/assets/pdfs/reports-and-publications/WhereRiversAreBorn1d811.pdf.

[164] Dan Sherburne, Mo. Coal. for the Env't Presentation to Small Streams Work Group, PowerPoint presentation, slides 1-3 (Feb. 21, 2009), attached as Ex. 40. The difference in density is apparent even to the untrained eye.

county to county would result in inconsistent protection for Missouri waters.[165]

In sum, the arbitrary, inconsistent, and deficient water body coverage in the proposed 100K rule presented significant negative implications for aquatic life and recreational opportunities. Any new rule based solely on the 1:100,000 NHD map would share those negative implications.

H. Missouri Responded to Judgment by Withdrawing the Proposed Rule and Delaying the Rulemaking Process Even Further.

The State was not willing to enact even the minimal protections provided by the deeply flawed 100K rule. MDNR withdrew its proposed 100K rule immediately after Judge Laughrey's decision – even before the appeal time had run out.[166] This withdrawal confirmed what the Coalition had long believed – that the State's 100K proposal was not a good-faith attempt to protect Missouri waters, but merely a ploy to avoid a negative court ruling. Missouri immediately returned to its tradition of completely ignoring the water quality of 85% of its streams, many of its lakes and all of its wetlands.

The State's withdrawal of its proposed 100K rule required the approval of the Commission. At the regularly scheduled Commission meeting on March 9, 2012, MDNR regulators sought a vote ratifying their withdrawal of the proposed rule.[167]

EPA was present for this meeting. The Region 7 Director of Water, Wetlands and Pesticides testified that EPA expected that the 100K rule be finalized soon, preferably by June 2012.[168] She urged the Commission to go forward with the rulemaking:

At this point in time Missouri still has ability to do exactly what it told the federal

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[165] The clear outlines of the relatively unmapped counties are apparent in the 100K Map, attached as Ex. 55.
[166] Video *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 69'18"-73'45", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.
[167] *Id.*
[168] Karen Flournoy Comment, Video *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 50' 37"-57'27", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.

> court it intended to do, and what it has said it long desires to do, shape its own standards without court orders and federal promulgations. But, there has been far too much delay on the issue and the time for action is now.[169]

She concluded by saying:

> EPA Region 7 strongly encourages the Commission to move forward and complete the rulemaking that would greatly expand the number of waters in Missouri that have the appropriate Clean Water Act water quality standards. The real bottom line here is about protecting the water quality in Missouri … this is a very important rule making and [] we want to make sure that the rule is the best possible, but we really urge you to get this rule in place in a very timely manner.[170]

Despite strong urging from EPA, the State stood by its plan to delay the rulemaking process. EPA stated that if the Commission tabled the rule, it is "in everyone's best interest" to bring the rule before the Commission again in "the next few months … not years. Definitely not years."[171] The State ignored this testimony. The Commission voted, approving withdrawal of the proposed 100K rule. The Commission then created a schedule for MDNR to develop a new rule amendment. No content for the new rule was specified, so it may well offer less protection to Missouri's waters than the proposed 100K rule. The Commission set a deadline of September 5, 2012 for the RIR of the new draft rule.[172]

Beginning May 17, 2012, MDNR began drafting the new rule. Stakeholders participated in work groups which met five times throughout the summer of 2012.[173] In addition to actively participating in the meetings, the Coalition drafted proposed rule language for protecting wetlands. By the end of August, it appeared that the new rule language would include

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[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] Video *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 69'18"-73'45", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.
[173] *Missouri Water Protection Forum: Water Classification Workgroup*, MISSOURI DEPARTMENT OF NATURAL RESOURCES, http://www.dnr.mo.gov/env/wpp/cwforum/adv-uncl-waters-wetlands.htm (last visited November 1, 2012).

fishable/swimmable protection for waters of U.S. within Missouri[174] and that MDNR had all of the materials needed to complete the RIR.[175] However, at the Commission meeting on September 5, 2012, MDNR informed the Commissioners that it had failed to meet the deadline and that no RIR or draft rule was available.[176] MDNR was not sanctioned in any way as a result of missing the deadline. MDNR did not or could not say when the RIR or the proposed rule itself would be completed. MDNR refused to provide any timeline for when the Commission could expect to review the final rule.[177] At the next Commission meeting on November 7, 2012, MDNR again reported that the RIR was not ready to be released for public comment. Finally, on November 21, 2012, MDNR released the RIR which included draft rule language for Missouri water quality standards.[178] This draft language for the rule is a variation of the 100K rule and still does not provide default fishable and swimmable protection for waters of the U.S. within Missouri. This is another example of Missouri feigning progress toward compliance with the CWA. The State's reversion back to the clearly deficient 100K rule demonstrates that the state has no intention to fully comply with the CWA and will continue to avoid adopting the default fishable/swimmable uses for as long as EPA will allow.

These latest developments are a further indication of the State's long-standing pattern of missed deadlines and unfulfilled commitments. As of today, more than 12 years later, Missouri is no closer to a rule assigning fishable/swimmable uses to the state's waters than it was in 2000 when EPA first informed Missouri that it needed to take action.

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[174] *Water Classification Workgroup - Meeting Notes For August 2, 2012, 9am-12pm*, MISSOURI DEPARTMENT OF NATURAL RESOURCES, http://www.dnr.mo.gov/env/wpp/docs/2012-08-02-notes.pdf (last visited November 1, 2012).

[175] Crandall Decl. ¶ 15, attached as Ex. 1.

[176] Leanne Tippett-Mosby Comment, Video *09-05-12 Missouri Clean Water Commission Meeting*, YOUTUBE (Sept. 5, 2012), at 49'-53'23", http://www.youtube.com/watch?v=3kiYjYrDg-U&list=UUtZkN4SEFjFUyhmZGPgqu8A&index=32&feature=plcp

[177] *Id.*

[178] *Water Protection Program Rule Development*, MISSOURI DEPARTMENT OF NATURAL RESOURCES, http://dnr.mo.gov/env/wpp/rules/wpp-rule-dev.htm, (last visited November 28, 2012).

VI. ARGUMENT

EPA has authority under § 303(c)(4)(B) to solve the problem described in this Petition–it has the power to promulgate water quality standards for waters of the United States within Missouri's borders when it determines that a standard is "necessary to meet the requirements of the Clean Water Act." It is undeniable that Missouri's waters do not meet CWA requirements. It is also clear that the state, if left to its own devices, will not bring its water quality standards into compliance with the CWA. The time for EPA to exercise its § 303(4) authority is now. It is EPA's duty to enforce the CWA and ensure the assignment of beneficial uses to all waters of the U.S. within Missouri. Consistent with the CWA and EPA's policies and past actions, the Administrator should promulgate new standards for Missouri.

A. Missouri's Water Quality Standards Do Not Meet the Requirements of the Clean Water Act.

Missouri's water quality standards are out of compliance with the CWA. The Act clearly states that water quality standards must include designated uses in accordance with the national goals of the Act.[179] EPA interprets this provision by establishing a rebuttable presumption that fishable/swimmable uses are attainable in all waters of the United States until proven otherwise.[180] On more than one occasion, EPA has highlighted the importance of the rebuttable presumption as an "essential foundation for effective implementation of the CWA as a whole."[181]

Missouri law does not contain the required rebuttable presumption. In fact, Missouri law turns this proposition on its head by neglecting to assign default uses to waters for which a UAA

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[179] 33 U.S.C. § 1313 (c)(2)(A) (2011) states: "Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation."

[180] Water Quality Standards for Kansas, 65 Fed. Reg. at 41,221.

[181] *Id.*

has not been performed. Missouri effectively presumes that fishable/swimmable uses are not attainable. Less than 15% of Missouri's waters have been assigned any use at all, disregarding the uses they should be legally presumed to have.[182] Congress set July 1, 1983 as the deadline for achieving the fishable/swimmable goals of the CWA. Almost 30 years later, Missouri is still far from compliance.

Missouri's entire water protection program is deficient because its water quality standards are severely inadequate. First, parties discharging pollutants into unclassified waters are shielded from compliance with nearly every CWA requirement. Discharge permits in Missouri do not contain water quality-based limits and dischargers are not subject to TMDL requirements. Over 71% of Missouri NPDES site-specific permitted discharges flow into unclassified rivers and streams.[183] Accordingly, downstream classified water segments are not reliably safe, since they receive pollutants from unclassified segments upstream. It is no wonder that the vast majority of Missouri waters are not safe for swimming, recreation, and fishing. Most Missouri waters are treated for regulatory purposes as if the CWA did not exist.[184]

Missouri's failure to meet this foundational requirement of the CWA of designating fishable/swimmable uses for all of its waters has been acknowledged by EPA,[185] Missouri,[186] and now by a federal judge.[187] There is no rational basis for EPA to continue to overlook Missouri's glaring non-compliance with the statute EPA is charged with enforcing. It is time that EPA step in and protect this "resource highly valued by Congress and the public" before it is "forever

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[182] *See* John Hoke, Mo. Dep't of Natural Res., Presentation to the Missouri Small Streams Advisory Group, PowerPoint presentation, slide 20 (Jan. 15, 2009), attached as Ex. 2.
[183] (A) NPDES GIS Shapefile, (B) Exported excel spreadsheet of data, and (C) metadata are all attached as Ex. 15.
[184] *See* John Hoke, Mo. Dep't of Natural Res., Presentation to the Missouri Small Streams Advisory Group, PowerPoint presentation, slide 20 (Jan. 15, 2009), attached as Ex. 2.
[185] Letter from Karen Flournoy, Dir. of Water, Wetlands & Pesticides, Envtl. Prot. Agency Region 7, to John Hoke, Mo. Dep't of Natural Res., at 1 (Jan. 18, 2012), attached as Ex. 51.
[186] Transcript of Missouri Clean Water Commission Meeting, 73 (Mar. 3, 2010), attached as Ex. 43.
[187] *Mo. Coal. for the Env't Found. v. Jackson*, 853 F. Supp. 2d 903, 908 (W.D. Mo. 2012).

lost."[188]

B. Missouri Will Not Meet the Necessary Requirements of the Clean Water Act in the Foreseeable Future Without EPA Intervention.

"Cooperative federalism" is one of the bywords of the Clean Water Act.[189] The Supreme Court has explained how the concept should work: "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" Practically, cooperative federalism gives states the opportunity to pass their own laws that meet federal requirements before subjecting their non-compliant state laws to federal preemption.[190]

Missouri has adopted a policy of what could be considered "uncooperative federalism." Year after year, the State has demonstrated a lack of commitment to revising water quality standards to meet federal requirements. The CWA has contained the fishable/swimmable goals and designated uses requirement since the early 1970s.[191] The interim national goal of fishable/swimmable protections for all waters of the U.S. was supposed to be achieved by 1983.[192] Missouri still is not even close to meeting this goal. Over the last 40 years, whenever Missouri had the chance to voluntarily change its regulations to meet CWA requirements by assigning fishable/swimmable designated uses to all jurisdictional waters, it declined to do so. As a result, Missouri citizens have been repeatedly denied clean water and protection under the CWA.

In EPA's most recent appeal to Missouri, it stated that, "for over 11 years, since September 2000, EPA has expressed its concern to the state of Missouri about the State's failure

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[188] Water Quality Standards for Kansas, 65 Fed. Reg. at 41,221.
[189] *New York v. United States,* 505 U.S. 144, 167 (1992).
[190] *Arkansas*, 503 U.S. at 101.
[191] 40 C.F.R. § 130.17 (2012). 40 Fed. Reg. 55,334 (Nov. 28, 1975).
[192] 33 U.S.C. § 1251(a)(2) (2011).

to apply the default fishable/swimmable designated uses for all waters including unclassified waters as required by the Clean Water Act." While EPA "strongly encourage[d] the Commission to move forward and complete the rulemaking that would greatly expand the number of waters in Missouri that have the appropriate Clean Water Act water quality standards,"[193] Missouri refused to take this step towards compliance.

In Section V of this petition, the Coalition outlined the many ways in which Missouri has consistently avoided improving its water quality standards to bring them into compliance with the CWA. This history is littered with unfulfilled commitments, missed deadlines, threats, entreaties, lawsuits, and repeated delays. The events at the March 9, 2012 Missouri Clean Water Commission hearing perfectly capture the State's combination of lip service to clean water goals coupled with its complete failure to take effective action to make those goals a reality.

EPA acknowledged at the March 9 hearing that it had been urging Missouri to assign uses to its unclassified waters since September 2000. EPA has given Missouri plenty of opportunities to consider rulemaking, and to shape its own standards without court orders and federal promulgations. However, the State has done no more than "consider" rulemaking for over a decade. EPA most recently gave the State a chance to complete its 100K rulemaking this year. The State decided to delay its rulemaking again, despite EPA's urging and in the face of a warning that the CWA required development of a rule.

Missouri did not meet the delayed September deadline it set for itself and although MDNR recently released an RIR for a proposed rule, it is unclear how long it will take for a rule to be filed. There is a strong possibility that no rule will be filed at all considering Missouri's history of breakdowns in the rulemaking process and withdrawals of rules at critical times.

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[193] Karen Flournoy Comment, Video *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 50' 37"-57'27", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.

MDNR's actions at the September 5, 2012 Commission meeting capture its attitude toward water protection—whenever progress looms, MDNR steps backwards, regardless of how often it is reminded that it must enact a fishable/swimmable rule and regardless of who tells it to do so.

Cooperative federalism may give Missouri the first opportunity to shape its own rules, but Missouri has had enough chances. At some point, it becomes irrational to believe that Missouri will do anything other than what it has been doing for the last 30 years: nothing. Missouri simply will not comply with federal law without promulgation by EPA. If EPA continues to allow a further, indefinite, and virtually open-ended extension of the time for Missouri to comply with the CWA, it would effectively repeal the clearly expressed Congressional mandate to protect the health of the nation's waters for the benefit of Americans. In EPA's own words, "[t]here has been far too much delay on the issue and the time for action is now."[194]

C. EPA Must Exercise its § 303(c)(4) Authority to Ensure that Missouri's Water Quality Standards Meet the Necessary Requirements of the Clean Water Act.

1. EPA Has Exercised its § 303(c)(4) Authority to Promulgate Default Uses and State Water Quality Standards in Other States

EPA has a duty to enforce the Clean Water Act's mandatory requirement of assignment of default fishable/swimmable uses to all waters of the U.S. within Missouri. The Act's cooperative federalism requires EPA to act when a state like Missouri fails to comply with its duties under the CWA. EPA has a duty to ensure that a state's standards comply with the CWA, and it must promulgate adequate standards when the state has failed to do so.[195]

In the last 15 years, EPA has exercised its § 303(c)(4) authority to promulgate default uses and uphold the CWA's rebuttable presumption of use attainability for four states and a

[194] Karen Flournoy Comment, Video *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 50' 37"-57'27", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.
[195] 33 U.S.C. § 1313(c)(4) (2011).

territory. Between 1996 and 2004, EPA either proposed to promulgate or did promulgate beneficial use designations for waters of the states of Arizona,[196] Idaho,[197] Alabama,[198] and Kansas,[199] and for the Commonwealth of Puerto Rico.[200] On each occasion, EPA made it clear that the reason for its exercise of § 303(c)(4) power was the territory or state's failure to enact a default rule that included a rebuttable fishable/swimmable presumption. EPA recognized its authority, while promulgating regulations for Kansas, and explained that where a state fails to designate uses protective of the CWA § 101(a) goal uses or fails to conduct UAAs sufficient to rebut the fishable/swimmable presumption, "federally promulgated CWA §101(a) goal uses will ensure the water quality goals of the Act are recognized."[201]

On April 28, 1997, EPA published a proposed rule in the Federal Register for Idaho.[202] EPA proposed to promulgate default use designations for Idaho's waters, which would provide for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water.[203] Ultimately, Idaho took action and addressed its unclassified waters in a way that EPA judged to be in accordance with the Act. EPA determined that federal promulgation was no

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[196] On May 7, 1996, EPA promulgated fish consumption uses to waters in Arizona that lacked this designation and an approved UAA. 40 C.F.R. § 131.31 (2012).

[197] On April 28, 1997, EPA proposed to promulgate a default use designation for unclassified waters for the state of Idaho which provided for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water. Because Idaho adopted a revised unclassified waters beneficial use designation which EPA determined to be in accordance with the Act, a federal designated beneficial use for unclassified waters was no longer required under § 303(c)(4). Water Quality Standards for Idaho, 62 Fed. Reg. 41,162, 41,164-65 (July 31, 1997).

[198] On March 5, 1998, EPA proposed new use designations for Alabama whose current use designations under state law did not meet applicable requirements of the Clean Water Act. Water Quality Standards for Alabama, 63 Fed. Reg. at 10,799.

[199] On July 7, 2003, EPA promulgated a primary contact recreation use designation for 1,056 waters, an expected aquatic life use designation for one of these waters, and a secondary contact recreation use designation for 230 waters in the state of Kansas to replace the use designations that EPA had disapproved of in 1998. 40 C.F.R. § 131.34 (2012).

[200] EPA promulgated designated uses and associated water quality criteria for six water bodies and an area of coastal waters known as the coastal ring for the Commonwealth of Puerto Rico. 40 C.F.R. § 131.40 (2012).

[201] Water Quality Standards for Kansas, 68 Fed. Reg. 40,428, 40,431 (July 7, 2003).

[202] Water Quality Standards for Idaho, 62 Fed. Reg. at 23,004.

[203] *Id.* at 23,006.

longer required in Idaho under § 303(c)(4).[204]

In 1998, EPA again proposed a rule to promulgate fishable/swimmable use designations for Alabama, another non-compliant state. Notably, when EPA exercised its § 303(c)(4) authority to disapprove Alabama's water quality standards, Alabama's practice for assigning uses was very similar to Missouri's system today. Just like Missouri, Alabama had failed to adopt "a default use classification for unsurveyed waters…."[205] Alabama's process for designating fishable/swimmable uses required a demonstration that such uses had actually been attained before they were protected. Alabama's approach assumed the unattainability of fishable/swimmable uses in impaired waters and EPA determined that this approach was "inconsistent with the requirements of 40 CFR Part 140 131.10." Thus, EPA proposed to promulgate a rule that would apply default fishable/swimmable protections to all of Alabama's waters.[206]

In 2003, EPA promulgated revised water quality standards in Kansas. The standards included primary contact recreation use designation for 1,056 waters, an expected aquatic life use designation for one of these waters, and a secondary contact recreation use designation for 230 waters.[207] EPA promulgation was necessary to replace Kansas' use designations which EPA disapproved during the triennial review. When commenters asserted that the use of the rebuttable presumption to propose use designations was "contrary to law,"[208] EPA defended the rebuttable presumption:

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[204] *See* Water Quality Standards for Idaho, 62 Fed. Reg. at 41,162-63.
[205] Water Quality Standards for Alabama, 63 Fed. Reg. at 10,802.
[206] *Id.*
[207] 40 C.F.R. § 131.34 (2012).
[208] Water Quality Standards for Kansas, 68 Fed. Reg. at 40,431.

> EPA disagrees . . . . EPA believes that using the "rebuttable presumption" approach is supported by sections 101(a) and 303(c) of the Clean Water Act. Further, EPA's longstanding interpretation, as reflected in its 1983 regulations, is that the purposes of the Act are better served by requiring a justification for designating uses less than fishable/swimmable rather than demanding an affirmative showing of attainability before requiring a fishable/ swimmable use designation. See 40 CFR 131.10.[209]

Additionally, EPA stated that federally promulgated uses are employed to ensure achievement of CWA water quality goals where a state fails to designate uses protective of the CWA § 101(a) goal uses or fails to conduct scientific studies sufficient to rebut the fishable/swimmable presumption.[210]

EPA has also historically used its § 303(c)(4) authority[211] to promulgate other fundamental requirements of states' water quality standards. In 1996, EPA used its § 303(c)(4) authority to promulgate an anti-degradation policy in Pennsylvania, raising water quality protection above previously insufficient state standards.[212] In 2002, EPA proposed new water quality standards for Kentucky that would have established an anti-degradation policy and implementation methods for its high quality waters.[213] Even when Kentucky revised portions of its anti-degradation policy prior to EPA intervention, EPA continued with a proposed rule because Kentucky's revisions did not address all of the inadequacies.[214]

In 2000, EPA used its authority to promulgate numeric water quality criteria for priority

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[209] *Id.*

[210] *Id. See also* 40 C.F.R. § 131.31 (assigning designated use of fish consumption to waters in Arizona); and 40 C.F.R. § 131.40 (assigning primary contact recreation beneficial uses to waterbodies in Puerto Rico).

[211] Several of these promulgations were made pursuant to § 303(c)(4)(A), rather than the § 303(c)(4)(B) authority invoked here by the Coalition. The Coalition has attempted to convince EPA to use its § 303(c)(4)(A) authority, but has been thwarted by Missouri's intransigence. Under EPA's interpretation of its authority, as recently affirmed by Judge Laughrey, EPA only has a duty to review new or revised state water quality standards. This provides the perfect opportunity for Missouri to continue to evade CWA standards because EPA does not have a duty to act under § 303(c)(4)(A) as long as Missouri continues to avoid enacting water quality standards related to its unclassified waters.

[212] Water Quality Standards for Pennsylvania, 61 Fed. Reg. 64,816, 64,817 (Dec. 9, 1996).

[213] Water Quality Standards for Kentucky, 67 Fed. Reg. 68,971 (proposed Nov. 14, 2002). Ultimately, Kentucky adopted an anti-degradation policy that the EPA evaluated and deemed adequate for compliance.

[214] *Id.*

toxic pollutants in California. [215] Although California recognized the need for applicable water quality standards for toxic pollutants, the Administrator decided to promulgate revised standards because the state's adoption efforts had been "stymied."[216] EPA stated that it interprets the CWA to "allow EPA to act where the State has not succeeded in establishing numeric water quality standards for toxic pollutants" and that, "inaction can be the basis for the Administrator's determination under § 303(c)(4) that new or revised criteria are necessary to ensure designated uses are protected."[217]

The Administrator made a determination that numeric criteria were necessary to protect human health and the environment, and EPA promulgated numeric aquatic life criteria for 23 priority toxic pollutants, numeric human health criteria for 57 priority toxic pollutants, and a compliance schedule provision.[218] EPA explained that the California rulemaking was "important for several environmental, programmatic and legal reasons."[219]

First, according to EPA, the "[c]ontrol of toxic pollutants in surface waters is necessary to achieve the CWA's goals and objectives."[220] Second, the EPA stated that the rule promulgation "help[ed] restore equity among the States." EPA further explained, while "[t]he CWA allows some flexibility and differences among States in their adopted and approved water quality standards, [] it should be implemented in a manner that ensures a level playing field among States."[221] California made important progress toward satisfying CWA requirements, but had not satisfied CWA § 303(c)(2)(B) by adopting numeric water quality criteria for toxic pollutants.[222]

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[215] 40 C.F.R. § 131.38 (2012).
[216] Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California, 65 Fed. Reg. 31,682, 31,684 (May 18, 2000).
[217] *Id.* at 31,687.
[218] *Id.* at 31,682.
[219] *Id.* at 31,683.
[220] *Id.*
[221] *Id.* at 31,684.
[222] *Id.*

EPA was clearly concerned with how California's water quality standards compared to standards in other states, and with the amount of time that California had been out of compliance. EPA emphasized that this requirement had been in place since 1987, and by 2000, California was "the only State in the Nation where CWA section 303(c)(2)(B) had remained substantially unimplemented."[223]

Finally, EPA highlighted the numerous deadlines in CWA § 303(c) and § 303(c)(4), which direct the Administrator to act "promptly."[224] EPA interpreted those provisions as reflecting Congress' intent to "eliminate State and EPA delays and force quick action."[225] EPA's explanation of the legal basis for promulgation stated:

> If EPA's review of the States' standards finds flaws or omissions, then the CWA authorizes EPA to correct the deficiencies (see CWA section 303(c)(4)). This water quality standards promulgation authority has been used by EPA to issue final rules on several separate occasions, including the NTR [National Toxics Rule], as amended, which promulgated criteria similar to those included here for a number of States. These actions have addressed both insufficiently protective State criteria and/or designated uses and failure to adopt needed criteria. Thus, today's action is not unique.[226]

2. Missouri's Current Water Quality Standards and Lack of Meaningful Progress Require EPA Action

When the CWA is successfully implemented, states evaluate waters at least once every three years and identify areas where waters do not meet federal requirements. Each state then revises its water quality standards, if necessary, which EPA reviews pursuant to § 303(c)(4)(A) to determine whether these changes bring the state into compliance. Generally, § 303(c)(4)(B) is reserved for situations where the cooperative federalism component of the CWA is unsuccessful

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[223] *Id.*
[224] *Id.* at 31,687.
[225] *Id.*
[226] *Id.* Most recently, EPA used its § 303(c)(4)(B) authority to develop federal numeric nutrient criteria in Florida, Water Quality Standards for State of Florida's Lakes and Flowing Waters, 75 Fed. Reg. 75,762 (Dec. 6, 2010). EPA retains its discretion to use its authority elsewhere, as appropriate.

and mere review of state standards is insufficient to achieve compliance.

As is clear, promulgation in the face of state intransigence is nothing new for EPA. Americans depend on EPA action when special interests in states block the passage and implementation of public health and environmental standards. EPA has exercised its authority to promulgate state water quality standards when a state has demonstrated that it will not enact standards necessary for CWA compliance on its own. When EPA promulgated for California, California already had designated uses and numeric water quality criteria, placing it several steps ahead of Missouri in achieving the CWA's goals. Just as California was the "only State in the Nation" for which numeric criteria for priority toxic pollutants had remained "substantially unimplemented,"[227] Missouri is one of the last states-if not the last state- where fishable/swimmable default uses have not been implemented. The CWA is not being "implemented in a manner that ensures a level playing field among States" when Missouri is allowed to be an exception to the rule.[228] The circumstances that EPA now faces with Missouri are much worse than those under which EPA exercised its § 303(c)(4)(B) authority in California. The numeric criteria for priority toxic pollutants requirement at issue in California was enacted by Congress for the purpose of supporting designated uses. Yet, Missouri has now been out of compliance with the foundational default use requirement for decades. EPA must now take action in Missouri to enforce the Clean Water Act, as it did in California.

EPA promulgation of a default rule designating fishable/swimmable uses for waters in Missouri is not an abuse of EPA authority nor is it unfair to Missouri. In fact, compared to other states, Missouri has been arbitrarily given a free pass on one of the CWA's most fundamental requirements for almost 30 years. As EPA Region 7 stated at the March 9, 2012 Clean Water

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[227] Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California, 65 Fed. Reg. at 31,684.

[228] *Id.*

Commission meeting:

> Missouri is not being singled out on this issue of designated uses. Missouri is in fact one of the last states in the country to provide fishable/swimmable protections for its waters. Almost every other state has already designated theirs with fishable/swimmable use protection or have approved use attainability analyses in place to demonstrate that the use is unattainable.[229]

While EPA has been fine-tuning use designations, specific water quality criteria and anti-degradation policies in other states, the majority of Missouri's waters have no basic designated uses for which an anti-degradation policy could even be considered. It is unreasonable for EPA to allow Missouri's waters to remain unclassified when Missouri stands alone among the states in its noncompliance and EPA has been promulgating higher-level requirements in other states for years.

Section 303(c)(4)(B) is reserved for situations where cooperative federalism has failed, and where EPA's triennial review of new or revised state standards is insufficient to achieve CWA compliance. It is clear by any account that Missouri has arrived at this point. Missouri has demonstrated that it is unwilling to propose water quality standards for EPA review at its triennial reviews. Missouri ignores the entreaties of its citizens and requests from EPA Region 7. The State's latest proposed rulemaking schedule does not represent the time frame of the "next few months" recommended by EPA. The deadline is completely unenforceable and the schedule appears to have been abandoned. If the State misses its next self-imposed deadline, it will bear no consequences and Missouri's waters will continue to be unprotected indefinitely.

VII. CONCLUSION

Insanity has been defined as doing the same thing over and over again and expecting different results. After years of unsuccessfully waiting for Missouri to bring its own water

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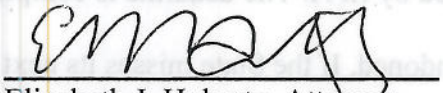
[229] Karen Flournoy Comment, Video, *03-09-12 Missouri Clean Water Commission Meeting part 1 of 3*, YOUTUBE (Mar. 12, 2012), at 50' 37"-57'27", http://www.youtube.com/watch?v=I6CdluYi9XI&feature=youtu.be.

quality standards into compliance with the Clean Water Act, it is fair to say that it is at least irrational for EPA to expect any improvement in Missouri water quality standards without EPA promulgation. There is no rational basis for EPA to continue to allow Missouri's non-compliance with such a fundamental aspect of the Clean Water Act. Missouri has made it clear through its repeated actions that it will not assign fishable/swimmable uses to its currently unclassified waters until it is compelled to do so by EPA.

EPA's exercise of its § 303(c)(4)(B) authority may be a measure of last resort, but in no circumstance is EPA intervention more appropriate than here and now. Assigning default beneficial use designations to all waters of the United States within Missouri is "necessary to meet the requirements of the Act," and is the only way that Missouri's waters will ever achieve compliance with the Clean Water Act. The Coalition respectfully asks EPA to promulgate a new water quality standard for the state of Missouri that assigns default fishable/swimmable uses to all waters of the United States within Missouri for which a valid Use Attainability Analysis has not been performed.

RESPECTFULLY SUBMITTED,



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